

**Women's Representation
in UK Politics:
What can be done
within the Law?**

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Executive Summary

This report considers the legal situation in the UK regarding 'positive action' by political parties to promote the selection of women candidates. Its purpose is to clarify the situation following the 1996 industrial tribunal decision against the Labour Party's all women shortlist policy, taking into account more recent developments. It is based on interviews with senior lawyers, representatives of the parties, and others. The main points are:

- Women's representation in UK politics remains relatively low. Though progress has been made in some areas, women remain only 18% of members of the House of Commons. This compares with 43% of parliamentarians in Sweden and 37% in Denmark.
- Experience in the UK and overseas shows that women's representation is boosted when parties use positive action ('quotas'). Recent improvements in women's representation made by the Labour Party at Westminster, and other parties elsewhere in the UK, has been primarily thanks to positive action.
- The UK parties have been cautious to adopt quotas since the industrial tribunal decision. Since then the Employment Appeal Tribunal has confirmed that selection of candidates is subject to the Sex Discrimination Act and Race Relations Act. More discrimination cases are therefore likely against parties, either because of positive action policies, or where women and ethnic minority candidates feel they have been discriminated against.
- Government could potentially resolve this problem by changing the law, but when this was proposed in 1998 some lawyers said this would put the UK in breach of European or human rights law. Yet many parties elsewhere in Europe operate quotas, and some countries - most recently France - have imposed quotas by law.
- Since 1998 there have been many legal developments. The Amsterdam Treaty has come into force, and the European Court of Justice has become more supportive of positive action. Meanwhile human rights law allows positive action which is 'proportionate'.
- Given these facts, and the prevalence of political quotas around Europe, it is highly unlikely that the European Court would interpret EU law as preventing quotas by political parties. The Court would be subject to heavy lobbying by member states and would not take such a controversial decision.
- Likewise, a legal change that permitted positive action would be unlikely to cause difficulties for government under the Human Rights Act - although parties might be challenged if they adopted quota systems which were not considered 'proportionate'. If the law were changed to make quotas compulsory the chance of a challenge against the government succeeding would be higher.
- The best solution would be a new electoral law to govern candidate selections. This could require fair procedures, but also allow positive action to promote women (and possibly other under-represented groups). Such a law would explicitly allow parties to adopt quota systems, and result in fairer representation for women. It would make clear that candidacy was not employment, and thus end the involvement by employment tribunals in resolving disputes between members and parties. It could require fair selections, in a framework which allowed parties and their members to retain control of the process.

Introduction

Significant progress has been made in the UK in recent years towards improving women's representation in elected political office. The 1997 general election saw the proportion of women in the House of Commons double from 9% to 18%. In 1999 the new Scottish Parliament and Welsh Assembly were established, with women's representation of 36% and 38% respectively; and the European elections saw the proportion of female MEPs rise from 17% to 24%.

However, these improvements can to a large extent be traced to the use of 'positive action' measures (commonly known as 'quotas') by certain of the political parties. It has been shown that the rise in the number of women Labour MPs in 1997 was primarily the result of the party's use of 'all women shortlists' for the selection of many of its candidates.¹ At the same time the number of women elected from other parties declined, from 27 to 19. Likewise, the Labour Party's policy of 'twinning' seats between male and female candidates had a significant impact on the proportion of women elected to of the Scottish Parliament and Welsh Assembly elections. Again, in the European elections the Liberal Democrats gained seven seats, and achieved a gender balance through a policy of alternating male and female candidates on electoral lists.

Yet the legal status of 'positive action' or 'quota' systems for selection of party candidates remains unclear. The issue of legality came to prominence when the Labour Party's all women shortlists policy was adopted in 1993. Early on, the view was expressed by some senior lawyers that this exclusion of male party members from applying for selection in half of Labour's winnable seats was in breach of the Sex Discrimination Act 1975. This thesis was later tested by an industrial tribunal, when two male members won a case against the party. Not only did this result in the end of the all women shortlists policy, but it also threw into doubt the legal status of any other positive action measures which might be adopted by the parties.

Since then, there have been suggestions that UK law should be changed to explicitly allow the parties to pursue positive action. In particular, there was pressure on the government in 1998 to amend the Sex Discrimination Act in time for selections for the Scottish Parliament and Welsh Assembly. However these proposals were rejected, amidst claims that an amendment to domestic law could place Britain in breach of European law, and possibly the Human Rights Act.

In this climate, the political parties have been cautious in adopting further measures to promote women's representation. There was considerable debate in the Labour and Liberal Democrat parties about whether it was legally safe to adopt positive action for the Welsh Assembly and Scottish Parliament elections. In the event, Labour pressed ahead, whilst the Liberal Democrats did not. To some extent the fear of legal action has impacted on all the parties, making it less likely that positive action is adopted. In particular, no party has adopted a set of procedures which will guarantee an increase in their number of women candidates for Westminster in 2001/2. Meanwhile the government, like the parties, is to some extent frozen by fear of the potential legal consequences of an amendment to legislation. Many policy makers find themselves at a disadvantage, given the complexity of the law in this area, and the changing legal landscape.

¹ Eagle, M. and Lovenduski, J. (1998). *High Time or High Tide for Labour Women?*, Fabian Society.

This report aims to bring a greater clarity to the situation. Its aim is to outline the main legal issues surrounding positive action by parties for candidate selection, and in the light of this to suggest some ways forward. The sections of the report which focus on the law are based primarily on a series of interviews carried out with senior lawyers from March - May 2000. The intention of the report was not to set out a fixed legal opinion, but rather to present the different opinions offered by those who are expert in the subject. Somewhat surprisingly, given the positions that some of those interviewed have taken in the past, there appeared to be relatively little disagreement. Thus the report puts forward a rather more settled view of the law than had been expected.

The report is in five sections. The first two sections set the context in terms of positive action and the political parties, Section 1 looking at the UK parties and Section 2 at parties elsewhere in Europe. Section 2 also considers briefly the domestic legal contexts within which other European parties operate, and gives some details about pan-European initiatives on positive action. The remaining three sections, which form the bulk of the report, focus on the legal questions facing the UK. Section 3 provides a context, outlining the relevant parts of UK and EU law, and explaining the industrial tribunal decision on all women shortlists and the subsequent debate in more detail. Section 4 looks at the legal questions facing the government and the parties, and the likely outcome of a future legal challenge if the Sex Discrimination Act was amended. Section 5 looks at ways forward, and suggests four different ways of changing the law, and their likely consequences.

The report has been structured in order that it can be read in parts. Those simply wanting to know current legal situation could begin reading at Section 4, whilst accepting that all the background information to the view expressed is in Sections 1, 2 and 3. The options for the future are summarised in Table 10, whilst the remainder of Section 5 explains these options in more detail.

1. Positive Action and the UK Political Parties

Some degree of positive action has been practised within the UK parties for more than 10 years. The use of such action in selection of candidates for elected office began with the Labour Party in 1988. Since then some form of positive action for candidates has been taken by the Liberal Democrats and Plaid Cymru, and has been the subject of debate in all of the parties to a greater or lesser extent. Prominent in this debate has often been the question of the legality of positive action.

The use of positive action by the parties has fed through into the levels of women’s representation amongst their elected members, as shown in Tables 1 to 5, below. Thus women’s representation amongst Labour members is generally highest and Conservative representation lowest, with a more mixed pattern amongst the more minor parties.

Table 1: Women’s Representation in the Welsh Assembly, 1999 election

Party	Constituency seats		List seats		Total	
	Men	Women	Men	Women	Seats	% women
Labour	12	15	1	0	28	53.6
Conservative	1	0	8	0	9	0.0
Liberal Democrat	1	2	2	1	6	50.0
Plaid Cymru	8	1	4	4	17	29.4
Total	20	18	15	5	60	38.3

Table 2: Women's Representation in the Scottish Parliament, 1999 election

Party	Constituency seats		List seats		Total	
	Men	Women	Men	Women	Seats	% women
Labour	28	25	1	2	56	48.2
Conservative	0	0	15	3	18	16.7
Liberal Democrat	10	2	5	0	17	11.8
SNP	5	2	15	13	35	42.9
Green	0	0	1	0	1	0.0
Scottish Socialist	0	0	1	0	1	0.0
Independent	1	0	0	0	1	0.0
Total	44	29	38	18	129	36.4

Table 3: Women's Representation in the Greater London Assembly, 2000 election

Party	Constituency seats		List seats		Total	
	Men	Women	Men	Women	Seats	% women
Labour	3	3	2	1	9	44.4
Conservative	6	2	1	0	9	22.2
Liberal Democrat	0	0	1	3	4	75.0
Green	0	0	2	1	3	33.3
Total	9	5	6	5	25	40.0

Table 4: Women's Representation in the House of Commons, 1997 election

Party	Men	Women	Total seats	% women
Labour	317	101	418	24.2
Conservative	152	13	165	7.8
Liberal Democrat	43	3	46	6.5
UUP	10	0	10	0.0
SNP	4	2	6	33.3
Plaid Cymru	4	0	4	0.0
SDLP	3	0	3	0.0
DUP	2	0	2	0.0
Sinn Fein	2	0	2	0.0
UKU	1	0	1	0.0
Independent	1	0	1	0.0
Speaker	0	1	1	100.0
Total	659	120	659	18.2

Table 5: Women's Representation from the UK in European Parliament, 1999 election

Party	Men	Women	Total seats	% women
Labour	18	11	29	37.9
Conservative	33	3	36	8.3
Liberal Democrat	5	5	10	50.0
UK Independence Party	3	0	3	0.0
SNP	2	0	2	0.0
Plaid Cymru	1	1	2	50.0
Green	0	2	2	100.0
SDLP	1	0	1	0.0
DUP	1	0	1	0.0
UUP	1	0	1	0.0
Total	65	22	87	25.3

1.1 Labour

The Labour Party first agreed the principle of quotas to promote women's representation in internal party positions in the late 1980s.² In 1988 a minimalist measure was agreed for candidate selection for Westminster, so that if a woman was nominated by a local branch, at least one woman should be included on the constituency shortlist. In 1993, following an electoral defeat where the party did not attract sufficient support amongst women, it was agreed that more radical measures were needed. Consequently the party's annual conference agreed that in half the seats where Labour MPs were retiring, and half the party's key target seats, local members would be required to select their candidate from an all women shortlist. Other seats would be open to both women and men. The seats to use all women shortlists would be decided on a regional basis, at meetings attended by constituency representatives. Where possible the agreement would be reached by consensus.

This was a controversial policy, and passed the conference by a narrow majority. Even after the decision had been taken there were a number of members who continued to campaign against it. However, 'consensus meetings' were successfully held in most regions, and selections went ahead using the system. In total, 35 of Labour's candidates for the 1997 election were selected from all women shortlists, all of whom are now MPs. The policy was dropped after the industrial tribunal ruling (described in Section 3.1), but this came relatively late in the process. Labour's electoral success in 1997 was accompanied by an increase in the number of Labour women MPs from 38 to 101, largely as a result of the all women shortlist system.³

The industrial tribunal ruling made the party understandably more cautious about adoption of positive action measures, and provided ammunition to those activists who had always opposed this approach. However, Labour went on to adopt a similarly radical measure for selections to the new Scottish Parliament and Welsh Assembly, elected in 1999. Labour won the 1997 election on a commitment not only to establish these institutions, but also with a stated objective of ensuring their membership was gender balanced. This commitment was made very publicly in Scotland, where Labour signed an 'electoral agreement' with the Liberal Democrats in 1995, committing both parties to 'select and field an equal number of male and female candidates . . . [and] ensure that these candidates are equally distributed

² Eagle, M. and Lovenduski, J. (1998). *High Time or High Tide for Labour Women?*, Fabian Society.

³ Ibid.

with a view to the winnability of seats'.⁴ In the Scottish Labour Party there was therefore a determination to remain true to this promise. It was realised that the image of the Parliament, and the Assembly, would be tarnished if they proved to be as male dominated as Westminster. And once men were elected it would be difficult to unseat them and improve women's representation later.

The system agreed in Scotland for the selection of candidates was to 'twin' neighbouring seats, taking into account the 'winnability' of the seats, so that each pair would select one man and one woman. This opportunity was uniquely available, given that there were no incumbent members. Under the system the members of the two constituencies would come together for the purposes of selecting candidates, and would have two votes - one for a woman and one for a man. The top man and top woman would be selected, and between them would agree who should have which seat. For the first time the party also agreed to use a panel of 'approved' candidates, from amongst whom constituencies could make their choice.

Pressure to adopt the twinning system came from the Scottish Labour Party, but the same system was also adopted - by a slender majority - by the Labour Party in Wales. The detail of the system was carefully designed in order to make it difficult for a disgruntled member to lodge a legal challenge on the basis of discrimination (see Section 4.2). This was threatened by a male councillor in Wales, but in the end never materialised. As a result of the system, 48% of Labour members elected to the Scottish Parliament, and 54% elected to the Welsh Assembly, were women. The same system was used again for the elections to the Greater London Assembly in May 2000, where four of the nine Labour members elected (44%) were women.

The party has been more cautious in its approach to future Westminster selections. A positive action system applies, but this is far less radical than the all women shortlists mechanism. Under this system all local branches are required to nominate one woman and one man. The constituency shortlisting committee must then draw up a shortlist which comprises equal numbers of women and men. There is no guarantee under this system that women will be selected, and to date only four women have been chosen from over 30 constituency selections. Alongside the 50/50 shortlist system go the adoption of various measures aimed to introduce an equal opportunities ethos into the process. A national panel of approved candidates has been introduced, with self-nomination and selection according to a published set of criteria. This system - like those in Scotland and Wales before it - has professionalised the selection process, making it more like that for a regular job. In the Labour Party the process now includes publication of job descriptions and person specifications for all levels of elected office. These are used for the selection of the approved panel and their use is encouraged in constituencies. Such measures were first adopted after the industrial tribunal stated that candidate selection was subject to discrimination law, for fear of future challenges from women or ethnic minority members. Similar approaches have also been adopted by the other parties, as discussed below.

1.2 Liberal Democrats

The Liberal Democrats currently enjoy the lowest level of women's representation at Westminster of the three main parties. At the 1997 general election they more than doubled their number of MPs, yet the number of Liberal Democrat women MPs actually fell, from four to three.

⁴ *Scotland's Parliament, Scotland's Right*, Edinburgh: Scottish Constitutional Convention, 1995.

This episode acted, to some extent, as a spur to action to improve women's representation. As a result of pressure from women activists the party was the only one to apply a strict positive action policy to selection of candidates for the 1999 European elections. This was agreed by Liberal Democrat conference in 1997. The European elections were fought on a new system of PR based on regional lists, which was certain to benefit the Liberal Democrats. The system chosen by the party to promote women was 'zipping', whereby male and female candidates were alternated on the lists. This could be applied relatively easily as there were only three incumbent candidates. A decision was taken centrally about which lists would be headed by women and which would be headed by men. Local members in the region then voted, on a one member one vote basis, amongst the candidates who were nominated. If the list in a region was due to be headed by a woman, for example, then the most popular woman would be placed at the top of the list. She would be followed by the most popular man, then the second most popular woman, and so on. This policy caused some controversy in the party, particularly in regions where only one seat was thought to be winnable. There were threats within the party that a legal challenge would be made against the system, but in the event this was not forthcoming. The result of the election was that the Liberal Democrats elected five male and five female MEPs.

The party has not been quite so successful, however, at securing better representation for women in other levels of elected office. In Scotland the Liberal Democrats signed the 'electoral agreement' with Labour, which committed them to electing equal numbers of women and men. However, the party failed to agree any mechanism to deliver on this commitment. Successive attempts to move a positive action system were voted down by Scottish party conference. The last attempt was made in March 1998, with a proposal that where there was an imbalance amongst the party's constituency candidates, the person at the top of the regional additional member list would be a woman. However this motion was not agreed. The party did use a system of 50/50 shortlists for the selection of constituency candidates. However, only 20 out of 73 constituency candidates selected were women, and most were not in winnable seats. Consequently just two of the Liberal Democrats' 17 MSPs are women.

In elections to the Welsh Assembly the party was luckier, with three out of six elected members being women. The process used here was the same as that in Scotland, with balanced shortlists in the constituencies and no form of positive action for regional lists (which were selected by one member one vote). A proposal to 'zip' the additional member lists in Wales was defeated overwhelmingly at a conference in autumn 1998.

There has been debate for many years in the party about the possibility for positive action in selection of candidates for Westminster, and this has been particularly prominent since the 1997 election. At the same conference in 1997 which accepted 'zipping' for the European elections, a proposal of 50/50 shortlists for Westminster selections was rejected (although the Scottish and Welsh parties will go ahead using this policy). The following year a proposal for 'clustering' seats, so that five neighbouring seats would together select at least two women and two men, was also rejected. The Liberal Democrats will therefore attempt to improve women's representation primarily through using equal opportunities procedures in selection of their national panel of approved candidates, and candidates for constituencies.

Like the Labour Party, the Liberal Democrats have had two difficulties with the adoption of positive action procedures. The first is persuading members of the principle, which many believe to be fundamentally 'illiberal'. The second is a concern that adopting such measures will leave the party open to legal challenge. This latter concern was reflected by the party's parliamentary support of two proposals in 1998 to amend the Sex Discrimination Act (see Section 3.1). These concerns were expressed as recently as November 1999, when Susan

Heinrich - chair of women Liberal Democrats, with support of Baroness Emma Nicholson and five others - wrote to *The Guardian* newspaper stating that 'There is now a need for urgent clarification of the measures which may be legally adopted to redress the imbalance [between women and men in politics]'.⁵

1.3 Conservatives

The Conservative Party has been more consistently opposed to positive action for women than either of the other two main parties. Despite the fact that 50% of Conservative members (and 25% of constituency chairs) are women, the party elected just 13 women to the House of Commons in 1997 - the same number as in 1931. Prominent women members who are frustrated at the Conservatives' lack of progress have described the party as 'silent on the subject of women, like a rabbit caught in the headlights of a rapidly approaching juggernaut'.⁶

Following the party's election defeat in 1997, William Hague made some attempt to persuade local parties to adopt positive action. A consultation document on internal party structures issued in 1997 suggested that 25% of those facing constituency selection panels should be women. Responses to the consultation, however, rejected this proposal. Discussions have continued at senior levels in the party about some form of positive action, but there have been concerns about the possible legal consequences. No measures were taken to ensure women's representation in the Scottish Parliament and Welsh Assembly - the Conservatives have three women out of 18 members in the former, and an all-male group of eight members in the latter.

The party has for many years used a panel of approved candidates for selections to Westminster.⁷ A similar process is now used by both Labour and the Liberal Democrats. Like these parties, the Conservative Party is now making efforts to integrate equal opportunities procedures into its selection process, both at the national panel stage and in local constituencies. A recent innovation is a video, produced by Central Office, which is sent to parties running selection procedures and advises against the use of questions which could be construed as discriminatory.

1.4 Plaid Cymru

Plaid Cymru has had a consistently bad record of women's representation at Westminster, having never had a single woman MP. However, the party managed to improve on its record when it elected five women out of a total 17 members to the Welsh Assembly in 1999. This represents 29% of the party group.

When the Government of Wales Bill was passed, Plaid Cymru debated whether to apply positive action to the selection of its prospective Assembly members. The National Executive Committee of the party rejected a proposal that a 'twinning' system, similar to that used by the Labour Party, be adopted. Instead it agreed that the additional member lists - from where the party expected to get most of its representation - should be used to counter any underrepresentation of women in the constituencies. It was agreed that each of the five regional lists would be headed by a woman, with a man second and a woman third. These candidates were selected by regional delegate conferences. There was relatively little concern

⁵ *The Guardian*, 4 November 1999.

⁶ T. Keswick, R. Pockley, and A. Guillaume (1999). *Conservative Women*, London: Centre for Policy Studies, page 3.

⁷ P. Norris and J. Lovenduski (1995). *Political Recruitment: Gender, Race and Class in the British Parliament*. Cambridge: Cambridge University Press.

in the party about the legality of this action. It was considered unlikely that a party member would mount a challenge against the party through the 'English' courts, given that it is Plaid Cymru's view that Wales should not be tied to an English legal system.

The party has also adopted a minimal requirement of positive action for Westminster selections, similar to that adopted by Labour in 1988. This is a requirement that if a woman applies to a constituency, there must be at least one on the shortlist put to local members (for fairness, the same rule applies to men). If there is more than one man and one woman on the shortlist, then there will be separate votes on each group, with a final run-off vote between the top man and top woman. However, despite this measure, Plaid Cymru has selected only one woman to fight a winnable seat at the general election.

1.5 Scottish National Party

The Scottish National Party has a better record of representation at Westminster, and currently has two women MPs out of six. There has been little recent debate about positive action measures for the selection of the party's candidates for the House of Commons.

However, the party did debate the possibility of using positive action for the selection of Scottish Parliament candidates. A proposal to use zipping for the party's additional member lists was made by its Women's Forum. However, this was rejected at party conference. Legal arguments were mentioned in the debate, alongside other objections, and the proposal was defeated by a narrow majority.

In the event the party went ahead with selection without a positive action mechanism in place, although encouragement was given to select women. There was an approved panel of candidates, selected against a set of written criteria using equal opportunities procedures. Constituencies chose their candidates from amongst the members of the panel, and the National Election Committee wrote to constituencies advising them to consider women. The lists of regional candidates were selected by regional delegate conferences. The party's election results were impressive, with 15 out of 35 members elected being women (13 of them elected from the lists). Explanations suggested for how the party did so well without a positive action mechanism include the better organisation of women, backed up by the Women's Forum, and the party's determination to see a new institution which looked very distinct from Westminster. However, it is also clear that there was considerable pressure from the centre to select women.

1.6 Summary of action taken

There are now a diversity of electoral systems operating in the United Kingdom. The House of Commons is elected by first past the post, using single member constituencies, whilst the devolved assemblies in Scotland, Wales and London use an additional member system which combines single member constituencies with electoral lists. The Northern Ireland Assembly is elected using the single transferable vote, whilst the European elections use a pure list system. Different parties have adopted a series of positive action systems to fit these different electoral systems.

The precise systems adopted also depend to some extent on individual party traditions, although it is notable that the parties' selection procedures are converging. All five of the parties discussed here use some kind of national panel for selections to Westminster, and similar Welsh/Scottish panels for selections to the Parliament and Assembly. In all five, local constituency parties are responsible for their own selection of candidates from this panel, but the involvement of members in selection of candidates presented on lists varies considerably (for example the Labour Party's list candidates were selected by panels of senior members,

whilst the Liberal Democrats used one member one vote and the SNP and Plaid Cymru used delegate conferences). All parties have made attempts, particularly since the industrial tribunal ruling, to integrate equal opportunities procedures into their selection methods.

Table 6: Summary of positive action policies by UK parties

	House of Commons	European Parliament	Scottish Parliament	Welsh Assembly
Labour	All women shortlists in 1997. 50/50 shortlists for next election.	None.	Twinning for constituency seats.	Twinning for constituency seats.
Liberal Democrats	None in 1997. 50/50 shortlists for next election in Scotland and Wales only.	Zippering.	50/50 shortlists for constituency seats.	50/50 shortlists for constituency seats.
Conservatives	None.	None.	None.	None.
SNP	None.	None.	None.	n/a
Plaid Cymru	None in 1997. For next election at least one woman and one man on a shortlist, where one is nominated. Separate run-off ballots between women and men.	None.	n/a	Women to top every additional member list, with men second, women third.

Those parties which have tried have had particular difficulties adopting an effective positive action system for single member constituency elections.⁸ The most successful has been the twinning system adopted by Labour for elections to the Scottish Parliament, Welsh Assembly and Greater London Assembly. This produced good results and withstood the threat of legal challenge (meaning, however, that the legality of the system remains untested in court). But such a system is only easily applicable to an election either where all seats are vacant, or where a party does not hold many seats. Thus twinning could be used by the Liberal Democrats for the House of Commons, but not easily by Labour or the Conservatives. For general elections the only mechanism which has been shown to work is the all women shortlist system used by Labour in 1997. However, this was the very system which sparked off legal challenge and led to the current uncertainties. A system of 50/50 shortlists has been adopted by both Labour and the Liberal Democrats, but has shown little sign of success, whilst the 'one woman on a shortlist' policy of Labour and Plaid Cymru has been even less successful.

⁸ The difficulty of securing fair women's representation under single member constituency systems has been widely noted. See for example Norris, P. (1996) 'Legislative Recruitment', in L. LeDuc, R. G. Niemi and P. Norris, *Comparing Democracies: Elections and Voting in Global Perspective*, London: Sage; European Parliament (1997) *Differential Impact of the Electoral Systems on Female Political Representation*, Women's Rights Series Working Paper W-10; IPU (1997) *Democracy Still in the Making: A World Comparative Study*. Geneva: Inter-Parliamentary Union. The effect of this in Europe is illustrated by Table 7 in the following section.

For list elections two mechanisms have been applied. One is the straight 'zipping' policy where men's and women's names are alternated on the list. This was adopted by the Liberal Democrats for the European elections, and debated by the SNP for 'top-up' lists for the Scottish Parliament. The other approach is a more pragmatic one, whereby seats on the list are allocated in a way which compensates for shortcomings in the constituency selections. This was the policy adopted by Plaid Cymru for top-up lists for the Welsh Assembly, and rejected by the Liberal Democrats for top-up lists for the Scottish Parliament. It must be noted, however, that the usefulness of these different mechanisms very much depends on a party's pattern of electoral support. For example zipping would have been of little use to the Labour Party in Wales, where the party gained only one of its 28 seats in the Assembly from a top-up list.

To a greater or lesser extent the debate about legality of positive action has influenced the behaviour of all the parties. This was a factor in the Liberal Democrat party and the SNP when these parties rejected positive action measures for the Scottish Parliament. Debates about legality brought the Labour Party's commitment to equal representation in the Scottish Parliament and Welsh Assembly (the latter in particular) close to collapse. Even Labour, which has so far led the field in terms of positive action measures, has no mechanism in place to ensure that it retains its proportion of women MPs after the general election. And in the Conservative Party the perceived legal obstacles provide ammunition to those members who oppose any form of positive action.

2. Positive Action Elsewhere in Europe

The United Kingdom is still significantly behind many other European countries in terms of women's representation in both the national and European parliament. Women's current representation amongst EU member states is illustrated in Tables 7 and 8. Representation in the House of Commons still stands at just 18.2%. In contrast, women make up 43% of members of the Swedish parliament, where women's representation passed the 20% mark in as long ago as 1973. The same level was reached in Finland in 1970.⁹

One reason for the British shortfall is that our political parties were relatively late in adopting positive action for women, in international terms. The adoption of quotas by the British Labour Party was influenced initially by international pressures, co-ordinated by the Socialist International Women and themselves inspired by positive action policies amongst the Nordic parties, where quotas were adopted in the 1970s.¹⁰ Since quotas were first adopted by European parties women's representation has increased dramatically in some cases. Recent moves have gone beyond quotas at party level, and in some EU states it is now compulsory by law to put forward gender balanced slates of candidates. In these circumstances it may appear strange that UK lawyers have indicated positive action could be in breach of EU law.

⁹ Raaum, N. C. (1999). 'Women in Parliamentary Politics: Historical Lines of Development', in C. Bergqvist, A. Borchorst, A. Christensen, V. Ramstedt-Silén, N. C. Raaum and A. Styrkárssdóttir (eds.), *Equal Democracies? Gender and Politics in the Nordic Countries*, Oslo: Scandinavian University Press.

¹⁰ C. Short (1996). 'Women and the Labour Party', in J. Lovenduski and P. Norris (eds.), *Women in Politics*. Oxford: Oxford University Press.

Table 7: Women's Representation in National Legislatures (lower house)

Country	% women	Election year	Electoral system for lower house
Sweden	43%	1998	List PR (closed lists)
Denmark	37%	1998	List PR (open lists)
Finland	36%	1999	List PR (open lists)
Netherlands	36%	1998	List PR (open lists)
Germany	31%	1998	Additional Member System (50% constituency, 50% list)
Spain	28%	2000	List PR (closed lists)
Austria	27%	1999	List PR (closed lists)
Belgium	23%	1999	List PR (semi-open lists)
Portugal	19%	1999	List PR (closed lists)
UK	18%	1997	First Past the Post
Luxembourg	17%	1999	List PR (open lists)
Ireland	12%	1997	Single Transferable Vote (3-5 member constituencies)
France	11%	1997	Two-round system (single member constituencies)
Italy	11%	1996	Additional Member System (75% constituency, 25% list)
Greece	10%	2000	Weak PR system

Source: Inter Parliamentary Union database¹¹

Table 8: Women's Representation in the European Parliament, by country

Country	Number of MEPs	Women MEPs	% women
Sweden	22	11	50.0
Finland	16	7	43.8
France	87	35	40.2
Austria	21	8	38.1
Denmark	16	6	37.5
Germany	99	36	37.4
Netherlands	31	10	35.5
Spain	64	22	34.4
Ireland	15	5	33.3
Belgium	25	7	32.0
UK	87	21	24.1
Portugal	25	5	20.0
Greece	25	4	16.0
Italy	87	10	11.5
Luxembourg	6	0	0.0

Source: Women of Europe newsletter no 87, July/August 1999.

The use of positive action by EU political parties is now relatively common, as demonstrated by Table 9. This is particularly true of socialist, social democratic and green parties. The table shows all 76 parties in EU states which have 10 or more members in the lower house of the national legislature. Of these, 35 (46%) were known to use a quota of some sort, whilst 34 (45%) were known not to use a quota.

¹¹ <http://www.ipu.org/parline-e/parlinesearch.asp>

Perhaps unsurprisingly, the parties which use positive action measures tend to be those with the best representation of women in elected office. Of the parties shown in Table 9, 35 (46%) achieve women's representation in the national parliament better than or equal to the Labour Party's record of 24.2%. Of these parties, 24 (69%) were known to use some kind of quota. A total of 17 (22%) of the parties - including the British Conservatives, Liberal Democrats and UUP - achieved women's representation of 10% or less. Of these, only one (4%) was known to use any kind of quota.

Table 9: Women's Representation in National Legislatures (lower house), by party

Party	Country	Election year	Seats held	% women	Party quota
1. VIHR	Finland	1999	11	81.8	y
1. PDS	Germany	1998	36	58.3	y
1. B90/Grüne	Germany	1998	47	57.4	y
1. Centerpartiet	Sweden	1998	18	55.6	n
1. GroenLinks	Netherlands	1998	11	54.5	y
1. Miljöpartiet de Grona	Sweden	1998	16	50.0	y
1. Social Democrats	Sweden	1998	131	49.6	y
1. PvdA	Netherlands	1998	45	48.9	y
1. Ecolo	Belgium	1999	11	45.5	y
1. SDP	Finland	1999	51	43.1	y
1. D 66	Netherlands	1998	14	42.9	n
1. Vänsterpartiet	Sweden	1998	43	41.9	y
1. Christian Democrats	Sweden	1998	42	40.5	y
1. SKL	Finland	1999	10	40.0	y
1. Socialstick Folkeparti	Denmark	1998	13	38.5	n
1. Venstre Liberale Parti	Denmark	1998	42	38.1	n
1. KOK	Finland	1999	46	37.0	y
1. Social Democrats	Denmark	1998	63	36.5	n
1. SPÖ	Austria	1999	65	35.5	y
1. Folkpartiet Liberelna	Sweden	1998	17	35.3	y
1. Social Democrats	Germany	1998	298	35.2	y
1. IU	Spain	1996	21	33.3	y
1. KF	Denmark	1998	16	31.3	n
1. Christian Democrats	Netherlands	1998	29	31.0	y
1. Dansk Folkeparti	Denmark	1998	13	30.8	n
1. Moderata Samlings P.	Sweden	1998	82	30.5	n
1. VAS	Finland	1999	20	30.0	y
1. PCP	Portugal	1999	17	29.4	n
1. ÖVP	Austria	1999	52	28.4	y
1. PSOE	Spain	1996	141	27.7	y
1. KESK	Finland	1999	48	27.1	n
1. VVD	Netherlands	1998	39	25.6	y
1. SFP/RKP	Finland	1999	12	25.0	y
1. Rifond. Comunista	Italy	1996	32	25.0	y
1. C.I.U	Spain	1996	16	25.0	not known
1. Labour	UK	1997	418	24.2	y
1. POSL/LSAP	Luxembourg	1999	13	23.1	y
1. PRL - FDF	Belgium	1999	18	22.2	n
1. FDP	Germany	1998	43	20.9	n
1. PD	Luxembourg	1999	15	20.0	n
1. PS	Portugal	1999	115	20.0	y

1.	CDU	Germany	1998	200	19.5	y
1.	PDS	Italy	1996	156	19.2	n
1.	CVP	Belgium	1999	22	18.2	y
1.	K.K.E	Greece	2000	11	18.2	not known
1.	VLD	Belgium	1999	23	17.4	n
1.	FPÖ	Austria	1999	52	17.3	n
1.	Partie Socialiste	France	1997	251	16.7	y
1.	PCS/CSV	Luxembourg	1999	19	15.8	y
1.	Popular Party	Spain	1996	156	14.1	not known
1.	PSD	Portugal	1999	81	13.6	n
1.	CSU	Germany	1998	45	13.3	n
1.	Labour	Ireland	1997	17	11.8	y
1.	PCF	France	1997	36	11.1	y
1.	Fianna Gael	Ireland	1997	54	11.1	not known
1.	PASOK	Greece	2000	158	10.8	y
1.	PS	Belgium	1999	19	10.5	n
1.	Fianna Fáil	Ireland	1997	77	10.4	not known
1.	Lega Nord	Italy	1996	59	10.2	n
1.	PSC	Belgium	1999	10	10.0	n
1.	Verdi (Greens)	Italy	1996	21	9.5	n
1.	Forza Italia	Italy	1996	123	8.1	n
1.	ND	Greece	2000	125	8.0	y
1.	Conservative	UK	1997	165	7.9	n
1.	P-S-P-U-P	Italy	1996	67	7.5	n
1.	Vlaams Blok	Belgium	1999	15	6.7	n
1.	CDS-PP	Portugal	1999	15	6.7	not known
1.	Liberal Democrat	UK	1997	45	6.5	n
1.	RCV	France	1997	33	6.1	not known
1.	UDF	France	1997	113	5.3	n
1.	Alleanza Nazionale	Italy	1996	93	4.3	n
1.	Lista Dini	Italy	1996	25	4.0	n
1.	RPR	France	1997	140	3.6	n
1.	CCD-CDU	Italy	1996	30	3.3	n
1.	UUP	UK	1997	10	0.0	n
1.	SP	Belgium	1999	14	0.0	n

Source: Council of Europe Women and Politics database,¹² supplemented by other information

Notes:

1. The table shows only shows parties with 10 or more seats in lower house.
2. The data on whether parties use a quota, most of which is taken from the Council of Europe database, may not be entirely reliable. The definition of 'quota' used by different parties is liable to differ - some parties listed as using quotas may use these only for internal organisation. Some parties shown as not using a quota may apply a target for candidate selection which is adhered to more or less rigidly.

2.1 Country case studies

The examples which follow illustrate some of the approaches which have been taken to positive action for women in different EU countries. These are chosen partly to demonstrate the different forms of system which are in operation under different electoral systems. This is important in the UK given the diversity of electoral systems in use for our different democratic institutions.

¹² <http://www.db-decision.de/index.html>

Sweden

Sweden currently has the highest level of representation of women in any national parliament in Europe, at 43%. All the Swedish parties listed in Table 9 achieve women's representation of at least 30%. Sweden also has the highest level of women's representation in the European parliament of any country, at 50%. Both elections use a pure list system of proportional representation.

The zipping system is commonly used by the Swedish parties to achieve gender balance amongst their elected representatives. This system is used by five parties (four of which are included in the table), with differing degrees of rigidity.¹³ The party which has given the policy the most formal status is the Social Democrats. The precise operation of the system varies among the party branches operating in the 26 electoral districts. Selection of candidates takes place at a delegate congress for the district. In some districts members vote on separate male and female lists, which are merged to produce a zip list (this was the system used by the Liberal Democrats for the European election in 1999). In other districts each candidate is elected individually, starting with the candidate who will head the list. Thus if a man is selected first, a woman should be selected next, and vice versa. The Green Party uses a similar system.

Germany

The German lower house is elected using an additional member system (AMS). This is a similar system to that used for elections to the Scottish Parliament, Welsh Assembly and Greater London Assembly, but with a higher proportion of list candidates. Half the members are elected from constituencies and half from party lists. A similar system is used for elections to German state-level assemblies. Germany is relatively unusual in the extent to which the candidate selection process is regulated. The constitution requires that political parties 'conform to democratic principles', whilst electoral law lays down a minimum level of party democracy in the selection of candidates.¹⁴

Three of the main German parties use some kind of quota for selection of candidates, although all of these apply the quota only to list seats. The Greens have the highest representation of women, currently at 57%. This is a result of their 50% quota, and the fact that they tend to win only list, not constituency, seats. The Christian Democrats use a less rigid system of quotas for electoral lists, set at 33% (i.e. every third candidate on an electoral list), and achieve women's representation of 19.5% in the Bundestag.

In the Social Democratic Party (SPD), a quota system was introduced in 1988. It was on a sliding scale, with the target of 25% women in parliament by 1990, 33% by 1994 and 40% in 1998. The party has not achieved this target - current representation is 35%. This is largely as a result of electoral success and the party's high number of constituency members. Selection of candidates for constituencies is run by local parties and, despite exhortation from the federal party to select women, there is no form of quota system in operation. In total 31% of the party's 212 constituency members are women. Additional member lists for the national parliament operate at the state level, and are thus selected by state parties. A list is proposed by the executive of the state party to a meeting comprising delegates of local parties. The 40% rule requires that the lists should be zipped, but with freedom to allocate every fifth

¹³ European Parliament (1997). *Differential Impact of the Electoral Systems on Female Political Representation*, Women's Rights Series Working Paper W-10.

¹⁴ Roberts, G. (1988). 'The German Federal Republic', in M. Gallagher and M. Marsh, *Candidate Selection in Comparative Perspective*. London: Sage.

place to someone of either gender. Amongst the SPD's 86 list members in the Bundestag, 45% are women.

Belgium

Belgium was one of the first countries in Europe to employ a statutory quota - i.e. a system requiring parties by law to put forward a minimum percentage of women candidates. This law was passed in 1994 and required that there should be a minimum of 25% women on all party lists for election. This rose to 33% in 1999. Initially it was suggested that there should be sanctions for parties which did not comply - including withholding state party funding. However, the Belgian Council of State, whilst allowing the quota, found the proposed sanctions to be unconstitutional. Instead if a party does not meet the quota it is required to leave the remainder of the seats on the list vacant.¹⁵

Despite this law, women's representation in Belgian politics is not high because the statutory quota does not state where women must be placed on the lists. Parties may therefore abide by the quota by placing women predominantly in unwinnable positions. Currently 23% of MPs are women. There is now a political debate going on about what should be the next step, and whether - for example - the law should enforce zipping for electoral lists.

France

The example of France is particularly pertinent to the UK because it is the only other country in Europe to use a single member constituency system for elections to its national parliament.¹⁶ There is thus a similar difficulty in achieving increased representation for women, and France has historically been alongside Britain near the bottom of European rankings of women in parliament. Currently just 11% of members of the Assemblée Nationale are women. However, the Socialist Party (PS) have made concerted efforts to improve women's representation and in government have just passed a radical law to increase the numbers of women in elected office at all levels. This goes further than the Belgian statutory system.

As early as 1982 a Socialist government passed a law setting a quota of 25% women candidates for local elections. However, a complaint was made to the Constitutional Council and later that year the law was struck down on the basis that it breached the constitutional right to equality. Little progress was made on women's representation in French politics for almost two decades after that.

However, the Jospin government has continued where its predecessor left off. In 1999 a constitutional amendment was passed, with the support of Gaullist President Chirac, which inserted a new clause stating that 'The law will encourage equal access for women and men to political life and elected posts'. This opened the way for the government to pass a new electoral law, without fear of the Constitutional Council, and this was achieved in May 2000.

The new electoral law regulates the proportion of women candidates at local, regional, national and European elections. It stipulates that for all elections using list PR systems, including local and regional elections, some elections to the Senate, and European elections, parties must put forward lists which are gender balanced. If lists are submitted which are not gender balanced, they will be declared invalid. This rule will first apply for the local elections

¹⁵ Leijenaar, M. (1996). *How to Create a Gender Balance in Political Decision-making*, Brussels: European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs.

¹⁶ The French use a two-round majoritarian system. There are two polls, with voters called back in each seat to vote again in a run-off between the top two candidates from the first round.

in March 2001. Furthermore, lists for European and Senate elections must be zipped. In other elections, including those to the lower house, parties are required to put forward a gender balanced slate of candidates, or pay a financial penalty. A party putting forward 49% of candidates of one sex and 51% of the other pays no penalty. But if the discrepancy is any greater than this, the party's state funding will be cut by an amount equalling half the percentage difference. Thus if a party puts forward 45% women and 55% men - a difference of 10% - it will lose 5% of its state funding. This system clearly offers a strong incentive for parties to comply. It will apply for elections to the lower house of parliament in 2002.

The Socialist Party itself applied a strict quota system for women in the lower house elections in 1997. This required that 30% of seats would be fought by women. In essence the system operated in the same way as the Labour Party's policy of all women shortlists. Geographical blocks of seats were considered together, by a party committee, and 30% designated as women's seats. An attempt was made to ensure that a fair portion of the seats were winnable. However in fact only 16.7% of candidates elected were women. The Socialist Party more successfully applied a quota system to its candidates for the European elections in 1999, when nine of the 18 Socialist members elected were women.

Italy

In Italy a law was passed in 1993 requiring parties to use the zipping system for elections using list systems. The law stated that 'male and female candidates will appear alternately' for the list part of any election. However, in September 1995 the Constitutional Court repealed the law, saying it was unconstitutional, on the basis that it contravened Article 51 of the constitution, which states that 'All citizens of either sex are eligible for public offices and for elective positions on conditions of equality, according to the requisites established by law'.

This matter is currently still unresolved. A joint committee of both houses of parliament reported in 1997 on proposals for far-reaching constitutional reform. Amongst its recommendations was the addition of words in the constitution stating that 'the law promotes balance between the sexes in elected representation'.¹⁷ The intention of this would be, as has happened in France, to overturn the previous ruling of unconstitutionality and allow a new quota law. However, the report of the commission has not been implemented and no separate action has yet been taken on this point.

Portugal

Portugal, like Italy, Belgium and France, has recently considered a bill which would have imposed statutory quotas. This bill was proposed by government in 1998 and would have required parties to have at least 25% of each sex on their lists for national and European elections. However, parliament rejected the bill. Nonetheless the Portuguese constitution has recently been revised to say that the active participation of women and men in political life is a fundamental condition of democracy.¹⁸

¹⁷ Senato della Repubblica (1997). *Progetto di Legge Costituzionale: Revisione della Parte Seconda della Costituzione*, Commissione Parlamentare per le Riforme Costituzionali. Rome: Senato della Repubblica (ref. 2583-A).

¹⁸ *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Implementation of Council Recommendation 96/694 of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process*, Brussels: CEC (2000).

2.2 Domestic legislation in other EU member states

The extent of positive action practised in some EU member states leads those coming from a UK perspective to wonder what is the legal framework, in terms of equalities legislation, within which these parties are operating. Given the obstacle which UK domestic legislation has presented to parties wanting to pursue positive action measures, it is useful to look at the domestic legal framework. Because of the perceived difficulties in Britain about complying with EU legislation, there is also an important question about why this hasn't caused difficulties in other countries. This question is considered in the later sections of the report.

It is interesting that challenges to quota systems adopted in other EU states have been made on grounds of constitutionality, rather than compliance with equalities legislation. This is because the selection of candidates is generally considered to be a constitutional matter, rather than something governed by discrimination legislation, which applies explicitly to employment. Thus in Sweden the Act on Equal Opportunities 1980 does not cover selection procedures by political parties.¹⁹ In Belgium there has been no debate about whether quotas are covered by the equal treatment legislation, since that covers only workers and the self employed. Likewise in the Netherlands, where four of the parties shown in Table 9 use quotas, there is an assumption that political parties and people chosen to fulfil political functions do not fall within the scope of the Equal Treatment Act. This applies only to civil servants, employees with a regular labour contract and the self-employed - politicians do not fall easily into any of these categories. In Germany there is no question that employment discrimination legislation should cover selection to political office, since selections are explicitly governed by electoral law.

Many countries, in any case, have discrimination legislation which explicitly allows positive action. For example the Danish Act on Equal Opportunity between Men and Women of 1988 states in Article 1(2) that 'public authorities . . . may in connection herewith implement special measures in order to promote equal opportunities for men and women'. Likewise the Consolidation Act on Equal Treatment of Men and Women (1990) states in article 13(2) that measures which deviate from the principles of equal treatment may be allowed 'with a view to promoting equal opportunities for men and women, mainly by redressing actual inequalities which have an impact upon the access to employment, vocational training, etc.'. In the Netherlands Section 2(3) of the Equal Treatment Act states that 'the prohibition on discrimination contained in this Act shall not apply if the aim of the discrimination is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce *de facto* inequalities and the discrimination is reasonably proportionate to that aim'. The Austrian Equal Treatment Act goes further, stating that 'promotion in favour of women must be enforced in all administrative units where women are under-represented below quota of 40% with regard to all salary scales and functions'.

Many EU countries have additionally introduced programmes which require women to be fairly represented on public bodies. In doing so, some have set down quite rigid positive action. For example in Denmark the Act on Equality in Appointing Members to Public Committees (1985) requires that public committees are gender balanced. Organisations represented on such committees are required to nominate a man and a woman, whilst the minister responsible must pick members so as to achieve balance. A government programme in Sweden laid down similar rule to achieve targets of 30% women on public boards by 1992

¹⁹ Borchorst, A. (1999). 'Gender Equality Law', in C. Bergqvist, A. Borchorst, A. Christensen, V. Ramstedt-Silén, N. C. Raaum and A. Styrkárssdóttir (eds.), *Equal Democracies? Gender and Politics in the Nordic Countries*, Oslo: Scandinavian University Press.

and 40% by 1995. In Germany a federal law passed in 1994 also stipulates that every federal authority with the right to propose candidates for consultative bodies must nominate two qualified candidates, a woman and a man, for each seat. As in Denmark and Sweden the authority responsible for the distribution of seats must ensure that there is a balanced participation of men and women. In the Netherlands the government went further and announced in 1992 that from then on it was only going to appoint women to existing advisory committees, until gender balance was reached. New committees would be initiated with a gender balance.²⁰ In Finland the 1987 law on equality states that men and women must be fairly represented in committees and consultative councils. In 1995 a quota was added so that at least 40% of each gender must sit on such committees. In Belgium a law adopted in 1997 states that nominations for consultative committees must be gender balanced, and that such committees must have a maximum of 2/3 of either sex.²¹ In Norway (which is not a member of the EU) the 1988 Gender Equality Act requires 40% representation on all non-elected public boards, councils and committees. This requirement extends to the cabinet, which has never had less than 42% women since 1986.²²

Whilst there have been some difficulties in European law about member states' positive action policies for employment (described in Section 3.2), it is interesting that there has been no dispute over such measures when applied to public bodies and committees.

2.3 International action

There has also been much action at pan-European and international level to promote improved women's representation in decision-making, and positive action.

In the early 1980s the European Commission looked at introducing a Directive on positive action. This would have required national public bodies to have positive action policies. However, the proposal of a Directive was rejected in favour of a legally non-binding recommendation.²³ The recommendation (84/635/EEC) urged member states:

To take steps to ensure that positive action includes as far as possible actions having a bearing on the following aspects . . . encouraging women candidates and the recruitment and promotion of women in sectors and professions and at levels where they are under-represented, particularly as regards positions of responsibility . . . active participation by women in decision making bodies.

The Commission's Third Action Programme on Equal Opportunities, 1991-5, identified decision-making (including political decision making) as a target for the first time. This Action Programme resulted in a European Summit on Women in Power in November 1992, held in Athens. The attendees were women in positions of power from amongst the member states, who published the 'Athens declaration', stating that:

²⁰ Leijenaar, M. (1996). *How to Create a Gender Balance in Political Decision-making*, Brussels: European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs.

²¹ *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Implementation of Council Recommendation 96/694 of 2 December 1996 on the Balanced Participation of Women and Men in the Decision-Making Process*, Brussels: CEC (2000).

²² Raaum, N. C. (1999). 'Women in Parliamentary Politics: Historical Lines of Development', in C. Bergqvist, A. Borchorst, A. Christensen, V. Ramstedt-Silén, N. C. Raaum and A. Styrkárssdóttir (eds.), *Equal Democracies? Gender and Politics in the Nordic Countries*, Oslo: Scandinavian University Press.

²³ Ellis, E. (1998). *EC Sex Equality Law*, Oxford: Clarendon Press.

We call upon the political leadership at European and national level to accept the full consequences of the democratic idea on which their parties are built, in particular by ensuring balanced participation between women and men in positions of power, particularly political and administrative positions, through measures to raise awareness and through mechanisms.

This declaration noted that positive action 'measures' might be necessary in order to improve women's representation in positions of power. A follow up conference four years later resulted in the 'Charter of Rome' (adopted on 18 May 1996), which reinforced this. The Charter stated that:

Where progress has been made, notably in the area of public life (in elected assemblies, in councils and consultative committees, etc), this has been the result of putting into force incentives and/or legislative or regulatory measures on the part of governments and political parties . . . We commit ourselves to take action for the urgent empowerment of women and to develop the necessary incentives and/or legislative or regulatory measures.

In 1996 the Commission's Fourth Action Programme on Equal Opportunities began. One of the objectives of the programme was 'to improve the gender balance in decision making at all levels'. In the same year the Commission agreed another recommendation, on 'the balanced participation of women and men in the decision-making process'.²⁴ This recommends that member states 'Adopt a comprehensive, integrated strategy designed to promote balanced participation of women and men in the decision-making process'. In 1999, as the Fourth Action Programme was drawing to a close Commissioner Flynn (Employment and Social Affairs) announced an initiative for 2000 to evaluate the measures adopted by member states to increase participation of women in decision-making. This was originally called for in the 1996 recommendation.

The Council of Europe have also taken an active interest in the issue of improving women's representation in decision making bodies. On 22 June 1999 the Council's Parliamentary Assembly adopted a recommendation on Equal Representation in Political Life (no. 1413). Point 12 (ii) of this recommendation stated that:

The Assembly therefore invites its national delegations to urge their parliaments to introduce specific measures to correct the under-representation of women in political life, and in particular . . . to institute equal representation in political parties and to make their funding conditional upon the achievement of this objective.

This is precisely the form of action which the French government has just taken, as detailed above.

Point 14 of the same recommendation called on states 'to implement the principle of equality and adopt special measures such as provided for by the United Nations Convention on the Elimination of All Forms of Discrimination against Women'. Article 4 of this 1986 Convention, commonly known as CEDAW, states that:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

²⁴ Recommendation of 2 December 1996 (96/694/EC).

These words from the Convention have been used to insert clauses in the domestic equalities legislation of many EU member states, as demonstrated by some of the examples in the previous section.

Lastly, the Inter-Parliamentary Council (the plenary policy making body of the Inter-Parliamentary Union) agreed a plan of action to correct imbalances in the participation of men and women in political life at its meeting in Paris in April 1994. Section III(4) stated that 'On a strictly interim basis, affirmative action measures may be taken.'

It is thus clear that there are not only many current examples of positive action to promote women's participation in political life, but that the principle of this form of action has received backing from numerous international bodies. In UK terms it must be emphasised that none of these agreements have the force of law. However, they do indicate the kind of international context within which the UK is operating, where such measures are neither new nor controversial. The dominance of such approaches is also liable to be influential on the courts, although it is not formally binding. This is discussed in Section 4.

3. The Legal Context

As discussed in Section 1, action to promote women's representation in UK politics has been hampered by concerns about the potential legality of such action. These concerns have particularly influenced the debate in the Labour Party, and the decisions taken by that party, which has nonetheless gone furthest in adopting measures to promote women's representation. However, concerns about the legality of positive action have also influenced the other parties, and resulted in a general approach of caution.

Concerns in the UK have related to both the status of positive action in domestic law and the implications within EU law if domestic law were amended. The latter concerns may look, on the face of it, somewhat curious, given the extent of positive action (both inside and outside the political parties) in other member states, and the various international agreements which have either sanctioned or encouraged positive action. However, these agreements do not have the weight of law in the UK. The only court case to date in the UK which dealt with positive action by a political party found this to be in contravention of domestic law.

This section of the report examines the legal arguments about positive action in candidate selection. It gives an account of the 1996 Industrial Tribunal ruling, and relevant subsequent rulings. It then outlines those aspects of EU and human rights law which might present problems for the UK if the law was changed. This is intended to provide the necessary background for the section which follows, which considers the likely dangers of a change to domestic law.

3.1 Domestic UK law

The Sex Discrimination Act and the Jepson case

The Sex Discrimination Act 1975 was passed in order to 'render unlawful certain kinds of sex discrimination and discrimination on the grounds of marriage, and establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally'.²⁵ The Act prohibits sex

²⁵ Preamble of the Act.

discrimination in three main fields. These are the 'employment field' (Part II), 'education', and 'goods, facilities and premises' (both covered by Part III).

Section 29(1) of the Act covers the provision of services 'to the public or a section of the public', and prohibits discrimination in this field. However, political parties are expressly exempted from this clause by Section 33 of the Act, which reads:

- (1) *This section applies to a political party if:*
 - (a) *it has as its main object, or one of its main objects, the promotion of parliamentary candidatures for the Parliament of the United Kingdom, or*
 - (b) *it is an affiliate of, or has as an affiliate, or has similar formal links with, a political party within paragraph (a).*
- (2) *Nothing in section 29(1) shall be construed as affecting any special provision for persons of one sex only in the constitution, organisation or administration of the political party.*
- (3) *Nothing in section 29(1) shall render unlawful an act done in order to give effect to such a special provision.*

When the Labour Party pursued its policy of all women shortlists, it had been advised that selection of candidates fell under this section, and thus that the requirement to treat men and women equally did not apply. Thus the exemption, the party believed, allowed it to exclude potential male candidates from consideration for certain seats. The Equal Opportunities Commission had received similar advice.²⁶

However, a legal challenge came from two male party members, Peter Jepson and Roger Dyas-Elliot. These members sought legal redress because they had been prevented from applying to be candidates in two seats (Regents Park and Kensington North, and Keighley, respectively). A complaint was lodged with the Leeds Industrial Tribunal in a case where Jepson (a postgraduate law student) represented the two men.²⁷ The Labour Party was represented by James Goudie QC.

Peter Jepson argued that the selection of candidates by a political party is not covered by Section 33 of the Sex Discrimination Act, which relates only to services, but instead by Part II of the Act, governing 'the employment field'. He relied on Section 13, in Part II, which prevents sex discrimination by professional bodies in awarding of qualifications. Section 13(1) states that:

It is illegal for an authority or body which can confer an authorisation or qualification which is needed for, or facilitates, engagement in a particular profession or trade to discriminate against [someone on grounds of sex] in the terms on which it is prepared to confer . . . that authorisation or qualification or by refusing or deliberately omitting to grant . . . application for it.

James Goudie argued that parliamentary candidates are not covered by Section 13 of the Act, because they are not in employment. Even MPs are 'office holders' rather than employees. In any case, the choice of who is elected as an MP is not made by the party, but by the voters. He stated that 'the regulation of the Parliamentary election process is the prerogative of Parliament itself, election courts, the High Court and the Privy Council and is not for an

²⁶ Equal Opportunities Commission (1997). *Improving the Representation of Women in Parliament: EOC Briefing*. Manchester: EOC.

²⁷ *Jepson and Dyas-Elliot v The Labour Party*, [1996] IRLR 116 ET.

industrial tribunal', arguing that selection of candidates is exempt from the Act under the provisions of Article 33.²⁸

However, the tribunal were convinced by Mr Jepson's argument that the Labour Party should be considered as a body granting a qualification. Ruling in favour of Jepson and Dyas-Elliot they stated that:

*[MPs] are not, we readily accept, in employment . . . but they are engaged in an occupation which involves public service and for which they receive remuneration from public funds. It is immaterial so far as section 13 is concerned that a person seeking to be considered for approval as an official candidate for a major political party has further hurdles to overcome before he or she can achieve a position as a Member of Parliament . . . in that sense he is in no different position from a person denied approval by a body under section 13, who does not yet have any particular work to do and who would need selection by others before obtaining such work.*²⁹

They went on to say that 'it is no answer to say that the applicants could still stand for parliament without endorsement by a major political party' because this is 'the only realistic way by which any person aspiring to be a Member of Parliament can achieve their ambition'.³⁰

The scope of an industrial tribunal is only to make judgement in the single case in front of it. Its result is not binding on other tribunals, and it cannot require a wholesale change of policy. Thus the ruling of the Leeds tribunal affected only the two constituencies which had been brought to its attention by Mr Jepson and Mr Dyas-Elliot. It did not have scope to directly influence the selection process in other constituencies, although given that the same policy was being pursued nationwide it was likely that a future tribunal would come to similar conclusions.

Those strongly supporting the Labour Party's policy of all women shortlists urged it to appeal the decision, by seeking a judgement at the Employment Appeal Tribunal. This would give a binding decision for all of England and Wales. However, the Labour Party chose not to take this route, for a combination of reasons. The Leeds tribunal had happened relatively late in the selection process, when 35 women had already been selected from all women shortlists. Its judgement had left these 35 candidates intact, whereas a case at the Employment Appeal Tribunal could throw these selections into doubt. In any case, it was possible that such a case would not be resolved before the impending general election. Thus instead of appealing, the Labour Party chose to drop its use of all women shortlists for those few selections which remained.

The 1996 industrial tribunal therefore left a number of unanswered questions. It remained possible (if unlikely) that in the event of a further case against a party pursuing positive action, a future tribunal might rule that this action was outside the scope of the Act, and therefore allowable. If a future tribunal supported the *Jepson* decision, it was possible that this could be overruled by an appeal from a political party to the Employment Appeal Tribunal.

²⁸ Ibid, paragraph 6.

²⁹ Ibid, paragraph 22.

³⁰ Ibid, paragraph 23.

However, once the *Jepson* ruling had been made, positive action appeared riskier than before. This was partly because once one high-profile case had been taken, it appeared more likely that further party members might seek to launch challenges against their respective parties. In the absence of a definitive ruling on the status of candidate selection within employment law, the parties proceeded cautiously.

A more settled view

In 1999 a definitive ruling was given by the Employment Appeal Tribunal. This time the case related to alleged racial discrimination, but depended on a section of the Race Relations Act 1976 containing virtually identical wording to that in the Sex Discrimination Act.

The case was again brought against the Labour Party, by a Mr Ahsan, who alleged that he had suffered racial discrimination in the selection process to become a local councillor.³¹ The Labour Party again claimed that selection of candidates was not covered by employment legislation. However, Mr Ahsan won his case in an Employment Tribunal.³² On this occasion the Labour Party appealed the decision, and the matter was thus decided by the Employment Appeal Tribunal.

The Ahsan case rested on whether selection as a Labour Party candidate - this time for local government - constituted an 'authorisation or qualification' for 'engagement in a particular profession' under Section 12 of the Race Relations Act (equivalent to Section 13 of the Sex Discrimination Act). In its judgement given on 14 July 1999, the Employment Appeal Tribunal upheld the findings of the Employment Tribunal - citing, among other things, the *Jepson* case. It ruled that:

*The endorsement of a candidate by the relevant process within the Labour Party, thus enabling him or her to describe himself or herself as the Labour Party candidate for election is an approval by a body which is needed for engagement in the particular occupation of Labour councillor.*³³

and that

*Being a councillor or a Labour councillor is a 'profession' or 'occupation'.*³⁴

The Employment Appeal Tribunal therefore backed up the industrial tribunal in the *Jepson* case, in ruling that candidate selection is subject to UK employment discrimination legislation. The Labour Party chose not to appeal this decision any further. It has therefore now become the settled position in UK law that selection of candidates by political parties is subject to Section 12 of the Race Relations Act, and by association to Section 13 of the Sex Discrimination Act. Any future employment tribunal would be bound to apply this decision. This therefore creates a more dangerous environment for parties pursuing positive action policies, since any such policy which was found to be discriminatory would be judged illegal by a future tribunal. This is discussed further in Section 4.2, below.

Having got support from the Employment Appeal Tribunal for his claim that candidate selection is subject to Section 12 of the Race Relations Act, Mr Ahsan has yet to have his case decided on the issue of substance: whether there was discrimination in the process.

³¹ *Sawyer v Ahsan*, [1999] IRLR 609 EAT.

³² Note that 'industrial' tribunals have been renamed 'employment' tribunals since 1996.

³³ *Sawyer v Ahsan*, [1999] IRLR 609 EAT.

³⁴ *Ibid.*

However, since the Employment Appeal Tribunal ruling another employment tribunal has found against the Labour Party in case of alleged racial discrimination.³⁵ This is the first time that such a tribunal has investigated in detail the ordinary selection procedures of a political party. Now that the principle of using discrimination law against parties has been established, it seems likely that further discrimination claims may follow. Parties may see a string of claims from disgruntled women and ethnic minority candidates who feel that the selection process is biased against them. As one commentator noted after the *Ahsan* case was decided:

*This important precedent thus opens the way to prospective candidates for local and national office to challenge their failure to be selected by a political party on grounds that they were discriminated against by reason of race, sex or disability. This will place the selection process for elective office under scrutiny like that for any other job. It means, for the first time, that political parties may have to explain and, in some cases justify, why particular candidates were rejected or selected.*³⁶

Moves to change the law

In 1998 the Equal Opportunities Commission issued a consultation paper seeking views about the updating of the sex discrimination laws.³⁷ This paper explicitly asked whether the Sex Discrimination Act should be amended to allow positive discrimination in the selection of political party candidates. The document produced at the end of the consultation, however, did not come down on one or other side of the argument, stating that:

*In general the EOC does not support positive discrimination - giving preferential treatment to a previously disadvantaged group of one sex to compensate for past discrimination. However, we recognise that there have been developments in the European Union on what are called 'special measures' which may have an effect in Britain. The Treaty of Amsterdam, which has been approved by the Government, suggest that some special measures may be acceptable. This is an important issue to consider while the Scottish Parliament and National Assembly for Wales are being set up.*³⁸

The government have yet to act on any of the Equal Opportunities Commission's proposals. However, the possibility of amending the law to explicitly allow positive action for selection of candidates was debated when the legislation was passing to establish the Scottish Parliament and Welsh Assembly.

On 2 March 1998 the House of Commons debated an amendment to the Government of Wales Bill, moved by Labour MP Julie Morgan.³⁹ This proposed that parties should be exempted from the Sex Discrimination Act for the selection of candidates to the National Assembly for Wales. It would have added the following clause to the Bill:

³⁵ *Ishaq v M. McDonagh and the Labour Party*, Hull Employment Tribunal decision 2 May 2000.

³⁶ IRLR, vol. 28 no. 10, p.599.

³⁷ *Equality in the 21st Century: A New Approach*, EOC, 1998.

³⁸ *Equality in the 21st Century: A New Sex Equality Law for Britain*, EOC, 1998. Since this time the Equal Opportunities Commission have come down more decisively in favour of 'special measures' for the selection of party candidates.

³⁹ *House of Commons Hansard*, 2 March 1998, col. 787-797.

(1) *The Sex Discrimination Act 1975 shall be amended as follows.*

(2) *After section 49 of the 1975 Act there shall be inserted:*

'Candidatures for National Assembly for Wales

49A. Nothing in Parts II to IV shall render unlawful any act done by or on behalf of a registered political party within the meaning of the Government of Wales Act 1998 if it is an act done for the purpose of, or in connection with:

- (a) selecting female candidates only, or male candidates only, for election to the National Assembly for Wales ('the Assembly'), or*
- (b) taking any steps preliminary to, or in connection with, such selection which either favour or subject to a detriment either female or male candidates, provided that in the opinion of the party concerned the act in question is in the circumstances necessary to attempt to secure an equal number of members of the sex favoured as there are of the other sex as candidates of that party for election to the Assembly'.*

The amendment was supported by both Plaid Cymru and the Liberal Democrats. However, after being debated it was withdrawn by Ms Morgan on the request of the government.

Later in the same month the House of Commons debated an amendment to the Scotland Bill proposed by Labour MP Maria Fyfe.⁴⁰ In this case the matter was approached differently, but the intention of the amendment was the same. The new clause proposed was as follows:

- (1) In the case of any court action undertaken by a person who claims not to have been chosen as a candidate for a constituency or regional seat at any election for the Parliament on grounds of his sex, the court shall, in forming its judgement, take into account the compliance or otherwise of the registered political party concerned with any relevant United Nations Convention and with any relevant Resolution of the United Nations Committee on the Elimination of Discrimination against Women, and the extent to which any temporary special measures undertaken by the political party in question are in compliance with that Convention or Resolution.*
- (2) Such measures as are mentioned in subsection (1) shall not be held to be in breach of the Sex Discrimination Act 1975, if both women and men have equal rights to selection as candidates for the political party in question, and the criteria for selection as candidates do not discriminate against men or women.*

This amendment was supported by the Scottish National Party and the Liberal Democrats. In support, the leader of the Scottish Liberal Democrats, Jim Wallace MP, stated that 'we will use the new clause in order to establish arrangements for a gender balance . . . we say "give us the [legal] backing and we shall do it"'. However, the amendment was not supported by the government and was defeated by 272 votes to 38. In explaining why the government did not support the amendment, Scottish Office minister Henry McLeish said:

The requirements of European employment law and particularly the Equal Treatment Directive have established the framework within which we must work. Any amendment to the Sex Discrimination Act enabling the parties to avoid falling foul of that domestic legislation might be found by the European Court of Justice to be in breach of the Equal Treatment Directive. We could not guarantee that the parties would be free from challenge. The challenge could arise in the domestic courts, which could refer the case to the European Court of Justice. The result could be a severe disruption of candidate selection procedures ...

⁴⁰ *House of Commons Hansard*, 31 March 1998, col. 1134-1146.

I appreciate that there is a view that standing for or being a Member of Parliament is not an occupation and therefore outwith the scope of EU law. However, the possibility of challenge exists and, in our view, it is more likely than not that such a challenge would be successful.

Thus the uncertainty has shifted from the status of positive action in UK law to its status in EU and international law. This is discussed in the following sections.

There has been one further attempt to amend the Sex Discrimination Act to explicitly allow positive action in the selection of party candidates. Labour MP and ex- Minister for Women Joan Ruddock has recently launched a campaign on this issue. This includes an Early Day Motion calling for a change in the law, which has been signed by 118 MPs of all parties.⁴¹ Joan Ruddock has also moved a ten minute rule bill which seeks to achieve this change. Like the earlier amendments this seeks to exempt political parties from the Act for pursuit of candidate selection processes which favour an under-represented sex. It would insert the following clauses in the Sex Discrimination Act:

Selection of candidates for elections

- 19A. (1) *This section applies to an act done with intent to remedy an existing inequality in the treatment of women as against the treatment of men.*
- (2) *Nothing in section 13(1) applies to the process of selection by a registered political party of a candidate for the purpose of a parliamentary or local government election.*⁴²

On this occasion the move to amend the Act was not opposed by the government, which may indicate a more relaxed attitude to the situation in EU law. However, Joan Ruddock's bill has virtually no chance of reaching the statute book.

3.2 European law

The government did not accept proposed amendments to the Sex Discrimination Act which would have protected parties using positive action for the selection of candidates for the Scottish Parliament and Welsh Assembly. The primary reason given for this was that a change in domestic law could fall foul of European equality law.

On 3 March 1998, in the midst of the debates on this matter, a memo was leaked to *The Guardian* newspaper of a high-level government meeting where this was discussed. Allegedly Secretary of State for Scotland Donald Dewar favoured using the Scotland Bill to introduce an amendment to the Sex Discrimination Act. However, at this meeting the Lord Chancellor, Lord Irvine, advised other cabinet colleagues that it would be unwise to accept such amendments. This was based on advice given to government law officers by Patrick Elias QC. According to the leak, Lord Irvine reported that if the Sex Discrimination Act were amended:

the probability was that a legal challenge under the European Equal Treatment Directive (ETD) would succeed . . . the law officers said that at each stage in the process - adoption of legislation, selection of candidates, and the election itself - the Government could and probably would be a respondent . . .

⁴¹ EDM 420, signed by 87 Labour, 23 Liberal Democrat, two Conservative, two SNP, two Plaid Cymru, one Democratic Unionist and one Independent MP.

⁴² Sex Discrimination (Amendment) (No. 2) Bill 2000 (debated in the House of Commons on 7 March 2000 (*Hansard*, col. 882-884)). The other clauses of the bill defined the terms 'parliamentary or local government' election.

*Any minister bringing forward or accepting an amendment would not be able to assure the House that it was ECJ proof. This would put him in an impossible position and create handling difficulties.*⁴³

Lord Irvine concluded that the government line should be that 'amendment of the SDA would be pointless because of the substantial risk of successful challenge under the ETD'. This was the line which was pressed publicly by Henry McLeish during the debate on the Scotland Bill. It is this fear, therefore, which appears to have been the biggest obstacle to amending domestic law in response to the *Jepson* decision.

As a member of the European Union, the United Kingdom is required to comply with EU legislation, including the terms of treaties and directives. If the UK clearly flouts a directive, it can potentially be taken to the European Court of Justice by the European Commission. Equally, a UK citizen can cite EU legislation in a case in a domestic court. If UK legislation is found to be in breach of EU law, either by a domestic court or through such a court asking for an opinion from the European Court of Justice, there will be an imperative for the law to be amended. Government would clearly not, therefore, want to be seen to be supporting an amendment to domestic legislation which could be found to be in breach of EU law.

The Equal Treatment Directive (76/207/EEC)

The specific piece of European legislation referred to by the government law officers was the Equal Treatment Directive. This Directive was adopted in 1976. According to Article 1(1):

The purpose of this Directive is to put into effect in the Member States the principle of equal treatment for men and women as regards access to employment, including promotion, and to vocational training and as regards working conditions and . . . social security.

The Directive thus, like Part II of the Sex Discrimination Act, relates to employment. Its legal basis was Article 235 of the Treaty establishing the European Community, which allowed action necessary to attain 'the operation of the common market'.⁴⁴ The Directive complements the Equal Pay Directive of 1975, which implements rules necessary to protect the principle of equal pay for men and women. This principle was originally set down in Article 119 of the Treaty of Rome, which stated:

Each member state shall . . . maintain the application of the principle that men and women should receive equal pay for equal work

Although the Equal Treatment Directive exists to prevent discrimination, it explicitly recognises that there may be a need for some limited positive action measures. In this regard it is different to the UK's Sex Discrimination Act. The relevant part of the Directive is Article 2(4), which states:

This Directive shall be without prejudice to measures to promote equal opportunities for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1).

⁴³ 'Why Irvine sent Dewar plan to boost women in Scottish Parliament back to the drawing board', *The Guardian*, 3 March 1998.

⁴⁴ Following the adoption of the Treaty of Amsterdam, Article 235 has become Article 308.

Some campaigners in the UK have argued that the provision in Article 2(4) would allow positive action by political parties in the selection of candidates. However, it is important to note that this part of the Directive is permissive rather than compulsory. It *allows* member states to sanction positive action, but does not *force* them to do so. Thus if the Sex Discrimination Act prevents positive action this is compatible with the Directive. However, if the Sex Discrimination Act were amended to allow some limited positive action this could also be acceptable.

The domestic legislation of many member states explicitly allows positive action (as demonstrated by some of the examples in Section 2.2 above). However, there has been a considerable amount of controversy in recent years about how far such positive action may go without falling foul of the anti-discrimination provisions of the Equal Treatment Directive. Three recent cases in the European Court of Justice have sought to interpret Article 2(4) and clarify the extent of positive action which the Directive allows. These cases have been used by campaigners on both sides of the argument in the UK to justify their positions.

The Kalanke and Marschall cases

The first of these cases was decided in 1995, and was a major blow to supporters of positive action. It was taken by a Mr Kalanke, who challenged the positive action provisions in the law of the German state of Bremen.⁴⁵ In this case a male and a female candidate (Mr Kalanke and Ms Glissmann) had applied for a job in the public service. The selection panel found them equally qualified and decided to give the job to Ms Glissmann on the basis that women were currently underrepresented. This was explicitly required by the Bremen Law on Equal Treatment for Men and Women in the Public Service. Mr Kalanke however contested that this was contrary to the principle of equal treatment and thus not allowable by the Equal Treatment Directive.

The case was referred by a German court to the European Court of Justice, which supported Mr Kalanke. In its ruling the court stated that:

National rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond equal opportunities and overstep the limits of the exception in Article 2(4) of the [Equal Treatment] Directive.⁴⁶

The court's position was that the Bremen law sought to enforce a principle of equal outcome, at the expense of the principle of equal treatment or opportunity. Article 2(4) specifically refers to 'opportunities', rather than results. This interpretation was elaborated by the Advocate General for the case (whose role is to summarise the legal arguments for the benefit of the court). He also indicated the kind of limited definition of positive action which might be considered to be in keeping with Article 2(4). This would allow preferential training for women, for example, but no divergence from the principle of equal treatment when it came to the point of selection:

Positive action must therefore be directed at removing the obstacles preventing women from having equal opportunities by tackling, for example, educational guidance and vocational training. In contrast, positive action may not be directed toward guaranteeing women equal results from occupying a job, that is to say, at points of arrival, by way of compensation for historical discrimination. In sum, positive action may not be regarded, even less employed, as

⁴⁵ Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen* [1994].

⁴⁶ *Ibid*, paragraph 22.

*a means of remedying, through discriminatory measures, a situation of impaired inequality in the past.*⁴⁷

The results of the Kalanke case reverberated around Europe. Since many member states had positive action clauses in their legislation, this opened up the possibility of serious problems. The European Council had committed itself to positive action through its recommendation of 1984 (see Section 2.3, above). In response to the ruling there was rapid action to reaffirm the status of positive action measures. The European Commission, which itself operated positive action for employment of staff, took the step of publishing an interpretation of the judgement. This referred to the earlier recommendation, and set out some positive action measures which it believed were allowable. The Commission's interpretation stated:

*at a time when equality of opportunity for women has been recognised at the highest level . . . to be a task of paramount importance . . . it is crucial to reaffirm the need to use, where appropriate, 'positive action' measures to promote equal opportunities for women and men, in particular by removing existing factors of inequality which affect women's opportunities in the employment area.*⁴⁸

This was a very different interpretation of the role of positive action to that offered by the court. In order to establish this interpretation in law, the Commission proposed an amendment to Article 2(4) of the Equal Treatment Directive. This would have replaced the existing article with the following words:

*This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect the opportunities of the underrepresented sex in the areas referred to in article 1(1). Possible measures shall include the giving of preference as regards access to employment or promotions, to a member of the underrepresented sex, provided that such measures do not preclude the assessment of the particular circumstances of an individual case.*⁴⁹

Although this amendment to the Directive was never made, its substance was accepted by the European Court of Justice in a second case which was decided in 1997. This gave a very different interpretation to Article 2(4), to the extent that it has been said it 'practically overrules *Kalanke*'.⁵⁰

This second case was brought by a Mr Marschall against the German state of North Rhine Westphalia.⁵¹ The circumstances were similar to the *Kalanke* case, in that an equally qualified man and woman had applied for a public sector job, which had been given to the woman. This action was taken under a state law saying that where there were fewer women than men at the relevant grade, women were to be given priority for promotion in the case of equal suitability, unless reasons specific to an individual male candidate tilted the balance in the latter's favour.

⁴⁷ Tesouro AG, case C-450/93, paragraph 19.

⁴⁸ *Communication to the European Parliament and the Council on the interpretation of the judgement of the Court of Justice on 17 October 1995 in Case C-450/93, Kalanke v Freie Hansestadt Bremen*, European Commission, 27 March 1996.

⁴⁹ *Equal Opportunities Review*, no. 68 (August 1996), p. 43.

⁵⁰ Betten, L. and Shrubsall, V. (1998). 'The Concept of Positive Sex Discrimination in Community Law - Before and After the Amsterdam Treaty', *International Journal of Comparative Labour Law and Industrial Relations*, 65-79, page 65.

⁵¹ Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*.

This 'saving' clause allowed the court to rule against Mr Marschall, without being seen to completely reverse its decision of two years earlier. The Court stated that:

A national rule which . . . requires that priority be given to the promotion of female candidates unless reasons specific to an individual male candidate tilt the balance in his favour is not precluded by Article 2(1) and (4) . . . provided that:

- *in each individual case the rule provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the candidates and will override the priority accorded to female candidates where one or more of those criteria tilts the balance in favour of the male candidate, and*
- *such criteria are not such as to discriminate against the female candidates.*⁵²

The change of position by the court in the *Marschall* case gave more flexibility to employers to pursue positive action. This would be allowed so long as the system used was not a rigid quota system, and allowed some discretion to the selectors to offer the position to the man, even where the woman was equally qualified. It is hard to see, however, how this form of discretion could be built into the selection process in political parties, where selection is more rule based, and decisions liable to be taken strictly on the basis of votes.

The Amsterdam Treaty

Following the controversy about positive action around these two cases, the issue of sex discrimination was an important one during the negotiations of the Amsterdam Treaty, which amended the Treaty of Rome. The new treaty came into force in May 1998. It included an important amendment to Article 119 of the original Treaty (now Article 141). This explicitly broadened the principle of equality from equal pay to include equal treatment, with the addition of a new paragraph 3, as follows:

The Council . . . shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

In addition, a new paragraph 4 was added to the same Article, with the clear intention of allowing positive action:

With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The inclusion of these clauses raises the status of the EU's commitment to equal treatment, and positive action, to treaty level. It also notably relates positive action to achieving 'full equality in practice' rather than simply protecting equal opportunity. However, like Article 2(4) of the Equal Treatment Directive, the new Article 141(4) is a permissive clause and does not compel member states to allow such action. Like Article 2(4) it also does not specify what forms of positive action will be allowed. The interpretation of the new clause will fall to the European Court of Justice, as and when cases come before it. The settled status of positive action in EU law will therefore take some time to emerge. However, there has already been

⁵² Ibid.

one case at the European Court of Justice which seems to indicate that it is becoming more tolerant of positive action systems.

The Badeck case

One of the most recent developments in EU equality law is the Badeck case, on which the European Court of Justice gave judgement on 28 March 2000.⁵³ This was once again a case referred from Germany, where positive action measures set down in state legislation were questioned. This time the state in question was Hessen.

The Hessen law requires the adoption of 'advancement plans' for women in employment in the public service. Such plans last for a two year period and affect employment and promotion of women in sectors where they are underrepresented. The plans must include binding targets such that 'more than half the posts to be filled in a sector in which women are under-represented are to be designated for filling by women', unless it can be demonstrated that insufficient suitably qualified women are available.⁵⁴ The plan will set down that at least as many women as men must be invited to interview, provided that sufficient well qualified women apply. If the targets are not met after two years, every new appointment or promotion of a man must be individually approved by the body which first approved the plan. The Hessen law also requires that at least half the members of advisory boards, supervisory boards and boards of directors must be women.

The provisions of the Hessen law therefore appear more far reaching than those considered in either the *Kalanke* or *Marschall* cases. Nonetheless, the European Court found nothing in the law which breached the Equal Treatment Directive. In support of this position the Court cited not only the two previous cases, but also the 1984 recommendation on positive action for women (see Section 2.3) and also the Amsterdam Treaty. The Court ruled that:

*Article 2(1) and (4) of the Directive does not preclude a national rule which, in sectors of the public service where women are under-represented, gives priority, where male and female candidates have equal qualifications, to female candidates where that proves necessary for ensuring compliance with the objectives of the women's advancement plan . . . provided that rule guarantees that candidatures are the subject of an objective assessment which takes account of the specific personal situations of all candidates.*⁵⁵

The Court specifically approved provisions stating that 50% of training places must be reserved for women (provided sufficient women apply); that half of those called to interview must be women; and that half the members of advisory bodies must be women.

It appears, therefore, that the debate since the *Kalanke* ruling, culminating in the new provisions in the Amsterdam Treaty, has resulted in a change of approach by the Court.

Latest developments

In the EU, treaties have the status of primary legislation, whilst directives are a form of secondary legislation:

Community legislation is based on the principle that Community secondary legislation cannot contradict the provisions of the Treaties; consequently all Community laws of a lower

⁵³ Case C-158/97, *Badeck and others v. Landesanwalt beim Staatsgerichtshof des Landes Hessen*. [2000] IRLR 432.

⁵⁴ *Ibid*, paragraph 10.

⁵⁵ *Ibid*, paragraph 38.

*rank than the Treaty of Amsterdam which may be contrary to the provisions of that Treaty concerning equality between men and women should be regarded as superseded by the new rule, or will have to be reinterpreted in the light of the new Treaty.*⁵⁶

Thus if the terms of the Equal Treatment Directive are thought to be in conflict with the clauses from the Amsterdam Treaty the Directive will need to be amended.

On 7 June 2000, the European Commission agreed a draft directive whose purpose would be to amend the Equal Treatment Directive. This sought to clarify the Directive in the light of recent case law and the new Treaty. One focus was the provision for positive action, where the draft directive proposes that Article 2(4) be deleted in its current form and replaced with the following words:

On the basis of the information provided by Member States pursuant to Article 10, the Commission will adopt and publish every three years a report establishing a comparative assessment of the positive measures adopted by the Member States pursuant to Article 141(4) of the Treaty.

The later article states that:

Member States shall communicate, every three years, to the Commission on the texts of laws, regulations and administrative provisions of positive measures adopted pursuant to Article 141(4) of the Treaty.

The new draft directive must now be discussed by the European Council and the Parliament, and it is not proposed that it is adopted by member states until 2002. However, the new clauses demonstrate that the Commission is moving further towards the encouragement of positive action than before. This, alongside the ruling of the Court in the *Badeck* case, indicate a radical change of approach in Europe since the *Kalanke* ruling.

3.3 Human rights law and international treaties

It has also been suggested that positive action by political parties could be found to be in breach of human rights law. The memo leaked to *The Guardian* in 1998 stated that one of the government law officers' concerns about an amendment to the Sex Discrimination Act was that:

*there could be ECHR implications, in the light of Article 3 to the First Protocol (free elections), which the Court has held as giving rise to an individual right to stand for election (Mathieu-Mohin and Clerfayr v Belgium (1987)), read with Article 14 of the Convention (freedom from discrimination).*⁵⁷

These concerns might be seen as particularly pertinent given that the European Convention on Human Rights (ECHR) has been incorporated into UK law through the Human Rights Act 1998. This will give all British citizens access to the rights in the Convention through UK courts, from October 2000 (in Scotland the ECHR is already effectively in force via the Scotland Act 1998). Thus challenges to UK legislation and activities of public bodies, amongst which political parties might be included, are likely to become more frequent under the terms of the Convention.

⁵⁶ *Women of Europe* newsletter, May 1998.

⁵⁷ 'Why Irvine sent Dewar plan to boost women in Scottish Parliament back to the drawing board', *The Guardian*, 3 March 1998 (see Section 3.2).

As the Irvine memo states, there are two parts of the Convention which, when read together, could be used to protect individuals from discrimination in the process of standing for election. As noted by the European Court of Human Rights in the case cited above, the interpretation of Article 3 of the First Protocol (free elections) has broadened:

from the idea of an 'Institutional' right to the holding of free elections, the Commission has moved to the concept of 'universal suffrage' and then as a consequence to the concept of subjective rights of participation - the 'right to vote' and the 'right to stand for election to the legislature'.⁵⁸

This has established 'the principle of equality of treatment of all citizens in the exercise of their rights to vote and the right to stand for election' under the Convention.⁵⁹

Article 14 of the Convention, on discrimination, reinforces this by requiring access to all Convention rights to be equal:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

These articles therefore appear to provide strong protection from discrimination in the right to stand for election. However, unlike the Sex Discrimination Act, the European Convention on Human Rights allows some forms of positive action. In a 1967 case relating to access to education for linguistic minorities, the Court stated that:

The principle of equality of treatment is violated if the distinction [between people from different groups] has no objective and reasonable justification. The existence of a justification must be assessed in relation to the aims and effect of the measure under consideration, regard being had to the principles which normally prevail in democratic societies.⁶⁰

The Convention therefore allows some flexibility in judging the appropriateness of positive action measures. It does not rely on a rigid anti-discrimination rule, as does the Sex Discrimination Act, but allows context to be taken into account. The key tests under the Human Rights Act would be whether a positive action measure was taken in pursuit of a 'legitimate aim', and whether the means used to achieve the aim were 'proportionate'. This is in keeping with the general approach that 'inherent in the whole of the Convention is a search for the fair balance between the demand of the general interest of the community and the requirements of the protection of the individual's human rights'.⁶¹ In other words, action to ensure equality of outcome may be allowed at the expense of some equality of opportunity. Indeed a new protocol is currently under discussion which would make the

⁵⁸ *Mathieu-Mohin and Clerfayr v Belgium*, 10 EHRR 1, 1987. Quoted in Clements, L. J., Mole, N. and Simmons, A. (1999), *European Human Rights: Taking a Case under the Convention*. London: Sweet and Maxwell, p. 233.

⁵⁹ *Ibid.*

⁶⁰ *Belgian Linguistics case*, 1 EHRR 241, 1967. Quoted in Clements, L. J., Mole, N. and Simmons, A. (1999), *European Human Rights: Taking a Case under the Convention*. London: Sweet and Maxwell, p. 215.

⁶¹ *Soering v United Kingdom*, 11 EHRR 439, 1989. Quoted in Wadham, J. and Mountfield, H. (1999). *Blackstone's Guide to the Human Rights Act 1998*. London: Blackstone Press, p. 14.

right to freedom from discrimination free-standing, but would also explicitly exempt positive action from the terms of the Convention.⁶²

International rights treaties have in fact long recognised the validity of positive action to promote the interests of groups which have historically suffered discrimination. Such action is often referred to as the use of 'special measures'. For example, the International Labour Organisation (ILO) Convention of 1958 states in Article 5 that:

1. *Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.*
2. *Any member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of people who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance shall not be deemed to be discrimination.*

Commitment to this principle has also more recently been made, as noted in Section 2.3, in the UN Convention on the Elimination of all forms of Discrimination Against Women. CEDAW allows adoption of special positive action measures so long as these are on a temporary basis. This clause is, like Article 2(4) of the Equal Treatment Directive, permissive rather than compulsory. The Convention has been ratified by the UK, although it has not been incorporated into domestic law. Other countries have used the Convention to insert words in their domestic equalities legislation to explicitly allow positive action (see Section 2.2).

4. The Legal Questions

Having set out some of the relevant legal context, we now turn to the more difficult issue of identifying what course of action the government and parties might sensibly take. A range of options for such action are set out in the Section 5. However, first, we turn our attention to what the broad legal questions are which the government and parties must face in taking their decisions.

It seems increasingly clear that the current legal situation is difficult for the political parties. This is discussed in more detail below. However, the bulk of this section focuses on what legal issues must be considered by government in deciding whether to pursue a change in UK law to allow positive action by political parties. As we have seen, the government adopted a very cautious approach to this issue in 1998 after being warned that an amendment to the Sex Discrimination Act could fall foul of the European Equal Treatment Directive, and possibly the European Convention on Human Rights. In this section such a claim is examined critically, particularly in the light of recent developments. The analysis is based on interviews with legal experts, in both the UK and EU. It is not possible, of course, to give a definitive answer to the legal questions most important to this debate. The opinions gathered are simply a 'best guess' of how the courts would interpret the law if faced with a case. A totally definitive position can only come about if the law is tested in the courts.

⁶² The draft protocol 12 on discrimination includes the words reaffirms in its preamble 'that the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality' (Moon, G. (2000). 'The Draft Discrimination Protocol to the European Convention on Human Rights: A Progress Report', *E.H.R.L.R.*, Issue 1.). If the protocol is agreed it is unlikely to be signed by the UK in the foreseeable future.

This is not to say that settlement of the matter through a legal case is desirable. The government and the parties would obviously prefer to pursue their business without having to face legal challenges. However, given that almost any option is open to potential challenge, the government and the parties will want to feel relatively confident that they could win legal backing for their position should a challenge arise.

The remainder of this section tackles four legal questions. The first is the question of what legal position faces political parties taking positive action now. The three remaining questions consider the likely outcomes if the law were changed. First, there is a question about whether selection as a candidate comes under the scope of the Equal Treatment Directive at all. Second, if it does, would positive action by the parties be found to be compatible with the Directive? And third, could human rights law be used to block such action? Before these discussions, however, it may be helpful to briefly outline the process which a legal challenge would follow. This will illustrate where in the legal system some of the questions addressed below might finally be resolved.

4.1 Legal process

At present, the Sex Discrimination Act presents a potential obstacle to political parties operating positive action measures. Without a legal change, party members can continue to use the Act to challenge their parties' selection procedures through employment tribunals. In this case a member would need to prove that they had themselves been a victim of discrimination. They would need to be an aspirant candidate who had made an attempt to be selected, but been prevented as a result of their gender. A challenge could not be brought simply by a member who opposes the policy.

If the Sex Discrimination Act were amended, this would allow the political parties to pursue positive action in selection of their candidates. However, a party member who felt they had been a victim of discrimination could still lodge a similar challenge. If the member claimed that the positive action adopted by their party was in contravention of the new law (for example because this allowed limited positive action but they felt their party's policy was too radical) it would fall to the UK courts, as now, to decide whether the measure pursued by the party was in keeping with domestic law.

Following a legal change it would obviously be less likely that domestic discrimination law could be used in the courts to attempt to block positive action. However, the complainant might raise the question of compliance with EU law. A domestic court would be able to address this question, but given the sensitivity of the issue it would be likely to refer specific questions the European Court of Justice. (Such a referral could come from any level of court. Thus, for example, if an employment tribunal decided the case, but one of the parties appealed on the basis of EU law, the Employment Appeal Tribunal could make a referral.) The European Court would not hear the case, but would be requested to interpret EU law on the specific points put to it by the UK court. The questions asked would almost certainly include two of those discussed below. If the result of the appeal to Europe was that the UK law was found to be in breach of EU law, there would be an onus on the government to change it. Otherwise, the case would simply hinge on whether the particular action of the party complied with domestic law.

In theory another course of action would be for the European Commission to take a case against the UK government, if an amendment to the Sex Discrimination Act put UK law in clear breach of European law. However, this appears highly unlikely. The Belgian government, for example, adopted a mandatory quota for electoral lists in 1994, and has not

been subject to such action. Other forms of positive action for public office in EU states, as described earlier in this report, have not attracted the intervention of the Commission.⁶³

A third alternative is that a challenge could be made by an individual under the Human Rights Act. Again such an individual would have to be a direct ‘victim’ of the alleged discriminatory action, and could not simply be a bystander who was unhappy about the policy. This qualification is set down in the European Convention on Human Rights.⁶⁴ Such a case under the Human Rights Act would initially be considered by UK courts. However, if legal remedies in the UK were exhausted (ie. the case had worked its way up through the legal system) an appeal could be lodged with the European Court of Human Rights in Strasbourg.

4.2 Can parties take positive action now?

One point worth clarification is what the legal consequences could be for a party adopting positive action now, under the current law. As described earlier, parties have adopted a range of policies, including ‘zipping’ candidate lists, ‘twinning’ constituencies, and requiring shortlists to be gender balanced, since the *Jepson* decision. Challenges were threatened to the Labour Party over twinning in Wales and the Liberal Democrats over zipping for the European elections, although in neither case did formal challenges materialise

The *Ahsan* decision in the Employment Appeal Tribunal removes the question about whether Section 13 of the Sex Discrimination Act covers candidate selection by a political party; it has now been established that it does. Any future tribunal would therefore look only at whether an individual who brought a case against their party had truly been the victim of discrimination.

In the case of all women shortlists, this argument was straightforward. Mr Jepson had been excluded from applying to a particular constituency on the basis of his gender, which clearly constituted discrimination in the eyes of the Act. The Labour Party did not claim, in its defence, that no discrimination had taken place, instead claiming that Section 13 did not apply. Once the tribunal had decided that Section 13 did apply, Mr Jepson’s case was easily won.

Proving that discrimination took place under any of the positive action measures more recently applied would be rather more difficult. Mr Jepson argued simply on the basis that he was excluded from the process at the outset. Quota systems which allow candidates of both sexes to be considered, but require equal numbers of each to be chosen, are not necessarily discriminatory. Furthermore, a member would need to have progressed much further through the system, and met discrimination, before they would qualify to lodge a challenge. For example, a challenge to the Labour Party’s policy of twinning would have required the complainant to have been member of the approved panel of candidates, have fought a local selection, and been beaten by a person of the opposite sex who had achieved fewer votes than them. These circumstances would have occurred, at most, rarely.

Nonetheless, it is possible that a future candidate could successfully challenge such a system. It is even conceivable that a minimalist system such as the Labour Party’s ‘one woman on a shortlist’ rule of the 1980s (now adopted by Plaid Cymru) could be successfully challenged.

⁶³ Also see the view of the Commission, quoted in Section 4.3.

⁶⁴ Article 34 of the Convention requires that a complainant be ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation’.

This would require a man to prove that he had been denied a place on the shortlist as a result of his gender (by demonstrating, for example, that he had received more votes than the woman or was otherwise better qualified). In deciding the outcome of such a case an employment tribunal would have no scope to consider the laudable objective of the policy, but would concentrate only on whether discrimination could be proven in the case of this particular individual.

Despite the permissive nature of EU and international law with regard to positive action, it is important to realise that this cannot be used to overrule domestic law on this point. There is currently nothing in EU law or the European Convention on Human Rights which *requires* governments to allow positive action. It is entirely at the discretion of member state governments to decide whether this is allowed.

We now turn to the issue of possible legal consequences if the United Kingdom government were to take such a step.

4.3 Does the Equal Treatment Directive cover candidate selection?

The *Jepson* case on all women shortlists hinged on the issue of whether candidate selection was in the 'employment field' as covered by Part II of the Sex Discrimination Act. In this case the Industrial Tribunal decided that it was and, as discussed above, this position has now been reinforced by the Employment Appeal Tribunal in the *Ahsan* case.

A similar question applies to the scope of the Equal Treatment Directive, which exists to regulate 'access to employment'. Thus if UK law were changed to allow positive action, and the European Court of Justice were asked to judge whether this complied with EU law, the first question would be whether the Equal Treatment Directive applied at all. If candidature was not judged to be employment under the terms of the Directive there is no other EU legislation which could be used to regulate it. Thus the Court would have no control over the activities of the UK government or parties in this matter.

There have been very few cases in the past where the Court has needed to consider the scope of the definition of employment in the Directive, and there has certainly been no case where the Court has considered the status of political office or candidature. Despite the operation of quota systems in political parties in many member states, and statutory quotas in the case of Belgium, no case has been brought to the Court to consider whether these actions are covered by the Directive. This appears to be because other member states consider candidate selection to be outside the scope of employment discrimination legislation. Although cases about positive action in employment have reached the European Court, it could be argued that the case of positive action by parties is quite different. The disadvantage, from the UK perspective, of no similar cases having been brought, is that the legal situation remains unclear. The fact that quota systems are in use throughout Europe, and have never been challenged under EU law, does not in itself make them legal.

Because there is no case law on this matter, the Court would have to return to first principles, considering the basis of the Directive and its original intention, to decide whether candidature should be considered 'employment'. The Directive's original purpose was to prevent discrimination in the labour market, in order to ensure that markets across the member states are harmonised. However, it is doubtful whether politicians are part of the 'labour market', and political and constitutional harmonisation is not an objective of the EU. If the European Court of Justice were to rule that candidate selection fell under the terms of the Equal Treatment Directive, then this would be seen by most member states as stepping into their constitutional arrangements. This could thus be seen as a major extension of the

powers of the EU - a course that the Court would be unlikely to take alone, without express new Treaty provision. Furthermore, applying the Equal Treatment Directive to member states' constitutional arrangements could result in difficult anomalies, not least with regard to provisions for succession to the British monarchy.⁶⁵ In many ways then, this judgement would be a highly problematic one for the Court to make.

The European Court of Justice would also be influenced by a number of external factors. One of these would be the objectives of member states and the European Commission in this field. For example, it would take account of the 1996 recommendation on the balanced participation of women and men in the decision-making process, and the fact that gender balance in decision making is a major objective of the Fourth Action Programme on Equal Opportunities. These commitments are not legally binding, but are part of 'soft law' - a context which the Court will take into consideration.

In anticipating how the Court would make its decision, it is important to realise that it is a far more political court than those in the UK. It is responsive to the views of the European Commission and member states. This was seen in its sharp change of attitude between the *Kalanke* and *Marschall* cases, following the reaction to the former judgement. In fact the Court has a formal process for canvassing the views of member states and the Commission before reaching its judgements. Thus in the *Marschall* case, submissions were received from the governments of Spain, Austria, Finland, Sweden and Norway in support of the positive action taken (the UK and French governments, on the other hand, submitted claims to the contrary). In such sensitive cases the Court is liable to be influenced by the common practice of member states, and by the submissions received. It will seek to interpret EU law in a way which takes these factors into account. At times this approach may considerably stretch the interpretation of the law. For example in the 1976 equal pay case of *Defrenne v Sabena* the court's ruling 'neatly reconciled the Court's policy with the interests of the member states. But it did so at the expense of legal principle'.⁶⁶

In a case on positive action for candidate selection, the European Court of Justice would therefore be influenced by the prevalence of this action by parties around Europe, and the fact that French and Belgian law now both include statutory quotas. A decision against the UK would be applicable in all member states and could thus throw the selection procedures of many European parties into disarray. The Court would therefore be subject to heavy lobbying from member state governments, stating that such action should be allowed.

Finally, the European Court of Justice would be mindful, in such a case, of the views of the European Commission itself. The Commission can submit evidence to the Court although

⁶⁵ A current Northern Irish case may prove to be of interest here. The case of *Perceval-Price, Davey and Brown v Department of Economic Development, Department of Health and Social Services and Her Majesty's Attorney General for Northern Ireland* received its judgement in the Northern Ireland Court of Appeal in April 2000. Here an industrial tribunal ruled that the Equal Treatment Directive applied to the appointment of tribunal judges, who might also be considered to have a constitutional role. The government appealed, but the Court of Appeal upheld the tribunal's decision. A further appeal has been lodged and a reference to the European Court is possible if the case reaches the House of Lords. The question of whether junior judges are subject to the terms of the Directive is rather different to that of whether legislators are covered (particularly since, as the Court stated, such judges are 'under the direction of another person' and 'expected to work during defined times and periods'). However, this would be the first time the European Court had been asked to state whether holders of any form of constitutional office are covered by the Directive.

⁶⁶ Case 43/75 [1976] ECR 455. Quote from Hartley, T. C. (1998). *Foundations of European Community Law*. Oxford: Oxford University Press, 1988, p. 81.

this, like evidence from member states, is not binding on the outcome. The European Commission has twice stated a clear belief that selection of candidates by political parties does not fall within the scope of the Directive, in answer to questions in the European Parliament. These are worth quoting in full, in order to give a clear picture of the Commission's view.

The first question was asked by Dutch MEP Nal van Dijk in March 1996, shortly after the *Jepson* ruling on all women shortlists:

When the industrial tribunal in Leeds ruled on 8 January 1996 that the . . . campaign of the British Labour Party involving women-only shortlists in some constituencies for elections to the Commons was illegal, did it base its judgement partly on directive 76/207/EEC and/or Article 119 of the EEC Treaty?

Does the Commission share the view that 'membership of parliament is . . . a job', and that the allocation of political offices is therefore covered by the scope of directive 76/207/EEC and Article 119?

If so, do the women's quotas on election lists which are used in various Members States by political parties constitute a form of positive discrimination which is an Infringement of Community legislation in the light of the judgement of the European Court of Justice in case C-450/93 (Kalanke v. Bremen)?

If Directive 76/207/EEC and/or Article 119 cover the procedures for nominating candidates and electing persons to political office, is the Court's judgement banning the indirect discrimination in favour of women applicable to these areas?

If so, is it then conceivable that the Court may be asked to rule on whether the British single-member constituency system ('first-past-the-post'), which obliges candidates to satisfy a catalogue of stereotype expectations - thereby putting major obstacles in the way of nominating and electing women to political office - constitutes a form of indirect discrimination which infringes the Treaty?

This question was answered by Commissioner Pádraig Flynn:

The Commission considers that both Article 119 of the EC Treaty and Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions refer only to employment relationships covered by a contract drawn up between the worker and his employer. Given that a candidature for election is not an employment relationship as described above, it does not fall within the scope of either Article 119 of the EC Treaty or Directive 76/207/EEC.⁶⁷

In the midst of the debate in the UK in 1998 over a possible amendment to the Sex Discrimination Act, the same MEP asked a further question:

The Commission will be aware of the recent discussion in the UK concerning possible measures to increase the number of women sitting in the new Scottish and Welsh Assemblies. In particular the proposal to ensure equal numbers of women and men in the assemblies would require an amendment to existing national legislation, in this case the

⁶⁷ Question 96/C 305/07, February 1996.

1975 Sex Discrimination Act, in order to avoid a repetition of the action brought against women-only shortlists in the Labour Party in 1996.

Senior UK lawyers are reported in the British media to have asserted that such a reform of the Sex Discrimination Act would fall foul of the European Equal Treatment Directive 76/207/EEC.

Would the Commissioner confirm his answer to my previous question . . . that the Equal Treatment Directive refers exclusively to employment relationships and that standing for election is not an employment relationship, so that election procedures do not fall within the scope of the Directive?

Would he agree, therefore, that it is wrong to cite European legislation as a legal impediment to national measures aimed at improving the number of women serving in elected bodies at local, regional or national level?⁶⁸

Commissioner Flynn responded even more forcefully than previously:

The Commission considers that Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotions, and working conditions refers only to employment relationships covered by a contract drawn up between the worker and his employer. Given that a candidature for election is not an employment relationship as described above, it does not fall within the scope of either Article 119 of the EC Treaty or Directive 76/207/EEC.

The Commission agrees that Community legislation is not a legal impediment to national measures to improve the representation of women in elected bodies.

Council recommendation 96/694/EC of 2 December 1996 on the balanced participation of women and men in the decision-making process recommends that Member States should adopt a comprehensive strategy to promote a balanced participation of women and men in the decision making process.

To sum up, there are four matters which the European Court would take into consideration in making its judgement, each of which suggest that it would choose not to rule that selection of candidates by parties falls within the scope of the Equal Treatment Directive. These are as follows:

- There is no precedent for considering candidate selection as subject to EU employment legislation. Extending the law in this way, to a matter which many member states consider constitutional, would be a difficult step for the Court.
- The EU as a whole is publicly committed to improving the representation of women in political office through its action programmes and recommendations, and these have endorsed positive action.
- Many member states operate positive action systems similar to that which might be employed in the UK and would lobby hard to ensure that these mechanisms were not derailed.
- The Commission itself has stated its clear belief that candidate selection should be considered to be outside EU law.

⁶⁸ Question E-1556/98, June 1998.

In these circumstances the Court would be most likely to seek to avoid confrontation by ruling that candidate selection was not within the scope of the Directive, but that this was a matter to be decided through the constitutional arrangements of individual member states. This would be in keeping with the domestic legislation of many member states. In this case, a change to UK law to allow positive action by parties would not concern the Court.

4.4 If the Directive applies, does it allow positive action?

So it appears probable that the European Court of Justice would rule that the Equal Treatment Directive does not cover the selection process. It is therefore quite unlikely that the Court would consider the substance of whether the positive action sanctioned by a new law was within the bounds of action allowed by the Directive. However, this section examines how the Court might react if faced with such a question. Many of the same arguments applied to the previous question are also relevant here.

At this point the wording of the new UK law would become important. If the law passed were a permissive one, for example using words directly lifted from Article 141 of the European Treaty, this would be very likely to be found to be in compliance with EU law. (Instead the legal question would be, within the UK, what forms of positive action were compatible with the new law.) If UK law were amended to allow 'temporary special measures', as sanctioned by the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the question of compliance with EU law would be less clear. If the UK was more prescriptive in its law about the kind of positive action which should be taken, as for example the French government have been, the result would be less predictable still.

In any of these cases the UK government would be likely to receive firm backing from other EU member states. As when considering the applicability of EU law, discussed in the previous section, the European Court of Justice would take into account European programmes to promote women's access to decision making, and would be heavily lobbied by member states and the Commission. If adopting words from CEDAW the UK would receive backing from those member states which have incorporated the words of the Convention into their domestic law. Even if imposing statutory quotas the UK would receive backing from France and Belgium, at least.

If these factors alone were not enough, the Court's attitude to positive action can be predicted on the basis of the past cases of *Kalanke*, *Marschall* and *Badeck*. The last of these gives the latest, and therefore probably most reliable, indication of the Court's thinking. As described above, this case concerned a quite prescriptive law from the German state of Hessen. This required that action plans be drawn up to improve women's representation in parts of the public sector where they are currently under-represented. The action to be taken included reserving half the seats on training schemes for women, requiring shortlists to include at least 50% women, and requiring that half of all posts be held by women (with every appointment of a man to be specially approved by a senior committee if the target of women employed has not been met). All of these provisions were approved by the Court.

This system, which is imposed on public sector employers, has many similarities to some systems used to promote women's candidature in the political parties. The requirement to reserve places on training schemes could be paralleled by a requirement that approved panels of candidates should be gender balanced. The requirement for 50/50 shortlists appears similar to that used by the Labour and Liberal Democrat parties for parliamentary selection. And the requirement that 50% of posts should be filled by women could be compared with a twinning system, or perhaps even all women shortlists in 50% of seats. This

case suggests that even if candidature were considered within the reach of the Directive, there is now considerable scope for a law which is either permissive of positive action measures or, as in Hessen, requires them. Also, it must be borne in mind that the new draft Directive (described in Section 3.2) would remove Article 2(4) altogether and make it easier still for the Court to sanction positive action.

The response of the European Court in a case brought against the UK is of not course certain. Indeed, the Court has been known to change its mind.⁶⁹ But those interviewed for this project agreed that recent developments, including the adoption of the Amsterdam Treaty and the judgement in the *Badeck* case, make it far more likely than previously that the Court would support the UK in promoting positive action. This fact was recognised by the government Law Officers in 1998 (before the new Treaty had come into force), when they said that 'the chances of successfully defending the proposal would be materially increased by the new . . . Treaty of Amsterdam'.⁷⁰

In summary, if the Court were faced with this question it would be likely to find a new law to be compatible with EU provision on positive action because:

- The Court would take into account the objectives of the EU in promoting women in decision making.
- It would be lobbied heavily by member states where positive action is used by parties, and is permitted - or even required - by law.
- The measures sanctioned by the new law would probably be similar to those recently approved by the Court in the *Badeck* case.
- In the near future, Article 2(4) of the Equal Treatment Directive - which has been the subject of recent controversies over positive action - may be deleted.

4.5 Human rights implications

The two previous sections discussed the likely outcome of a challenge to positive action, as sanctioned by a revision of UK legislation, using EU law. There is also another, separate, matter to consider. This is the possibility of a challenge using human rights law. There are some parallels to the previous arguments in considering the likely outcome of such a case.

Such a challenge could be brought by an individual under the Human Rights Act (after October this year). A case might be brought either against government, for sanctioning or requiring positive action, or against a party, for practising it. A case would be decided in the UK courts, although it could reach the European Court of Human Rights on appeal.

If a change in the law were permissive of positive action, there is very little chance that this could be brought into question through a challenge under the Human Rights Act. As discussed earlier, the European Convention on Human Rights allows limited positive action. This has been explicitly sanctioned by the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW), whilst the Council of Europe has recently proposed that political parties should be required to introduced special measures for women or suffer financial penalties (see Section 2.3). The law itself could only be brought into question if it were interpreted to require positive action which was not both legitimate and proportionate. If drafting an amendment to legislation it might therefore be sensible to build

⁶⁹ Unlike UK courts 'The ECJ is not formally bound by previous rulings, although in practice, like any other court, it rarely departs from previous decisions.' (Boch, C. (2000). *EC Law in the UK*, Harlow: Longman, p.10).

⁷⁰ 'Why Irvine sent Dewar plan to boost women in Scottish Parliament back to the drawing board', *The Guardian*, 3 March 1998.

these requirements into a new clause. However, an amendment using words from existing EU law, UK law or CEDAW would also be likely to be found compatible with these criteria.

If the government took a more radical approach, such as France has recently done, and required positive action, this could be more open to challenge. In such a case it would be incumbent on government to demonstrate that it was a sufficiently 'legitimate aim' to use positive action to achieve a legislature which was gender balanced, and that it was 'proportionate' to require parties to take whatever action the new law required. If such a case were to proceed to the European Court of Human Rights in Strasbourg, it would become a major political issue, with pressure put on the court by France and other states. Support would be likely from signatories to the Convention which have in place compulsory positive action mechanisms for other forms of public office (see Section 2.2). It is possible, of course, that the French system will be challenged, and this may give some indications to the UK of the likely outcome of such an approach.

It is also possible that with a permissive (rather than compulsory) legal framework, a challenge might be made under the Human Rights Act against a party pursuing a particular form of positive action. In this case the first question would be whether a party was an appropriate target for such action. The Act limits the direct applicability of the rights contained in the European Convention on Human Rights to actions carried out by 'public authorities', which are defined by Section 6(3)(b) as bodies 'certain of whose functions are functions of a public nature'. With the Act not yet in force there is obviously no case law stating whether a political party would be considered such a body. Given that parties could be argued to perform public functions, and are in receipt of some limited public funds, they might be judged to be subject to the Act.

If the court judged that the party was a relevant target for such an action, the factors taken into account would be whether the positive action measures adopted were legitimate and proportionate. Thus if the law were changed to permit positive action, rather than requiring it, it would fall to the courts to decide which form/s of positive action were acceptable. A party might find it easier to defend 50/50 shortlists than all women shortlists, for example. However, even in the latter case if the mechanism were applied in only 50% of constituencies, and could be shown to be the only effective mechanism to promote women's representation, it might receive the backing of the court.

An alternative angle is to consider the consequences under the Human Rights Act of *not* passing a change in the law. It has been suggested that the application of the Sex Discrimination Act to prevent positive action in candidate selection is a restriction of political freedoms. In commenting on the *Jepson* case John Wadham and Helen Mountfield have suggested 'It is arguable that by applying the law on "jobs" to selections of the legislature, the tribunal restricted the expression of political views disproportionately, and so is contrary to Protocol 1, art. 3' (free elections).⁷¹

In summary:

- A change in the law which was permissive of positive action would hold little danger for the government under the Human Rights Act, although the parties might need to consider carefully the measures they put in place and ensure these were 'proportionate'.

⁷¹ Wadham, J. and Mountfield, H. (1999). *Blackstone's Guide to the Human Rights Act 1998*. London: Blackstone Press, p. 126.

- An overly prescriptive law might be more problematic for government. However, if such a case were to reach the European Court of Human Rights the UK would be supported by other states which operate similar systems.
- If the law is not changed there is a possibility for party members to challenge the current system on the basis that their choice of candidates has been overly constrained.

5. Ways Forward

The previous sections have considered the law and its interpretation, in the light of UK and other European experience of candidate selection. In particular, the likely consequences of adopting a legal change to allow positive action by political parties has been considered. However, previous sections have not looked in detail what form such a legal change might take.

In this final section, five distinct courses of future action are considered. In each case the advantages and disadvantages of the proposed course of action are considered, both for government and the parties. The different options are then summarised in a table at the end of the section.

Option 1: Do nothing

One option is obviously to do nothing. Since the *Jepson* decision no change has been made to the law, despite the proposals, including specific legislative proposals, which have been made. Since 1999 the legal situation has become clearer, since the Employment Appeal Tribunal has confirmed that candidate selection falls within the scope of employment discrimination legislation.

Advantages of this approach

Taking no further action is the low-fuss option. The legal situation is increasingly clear and the parties are thus having to adjust. If no action is taken, there is little immediate threat that the government will be subject to proceedings under the Equal Treatment Directive and Human Rights Act.⁷²

Disadvantages of this approach

However, this option also has clear disadvantages. Some of these are as follows:

- The parties have been very cautious since the *Jepson* decision about adopting positive action policies. If no change is made to the law, further legal challenges against the parties remain likely. Parties can no longer claim (as they could even from 1996-99) that their selection processes are exempt from legislation. Any positive action system, including minimalist measures such as 50/50 shortlists, is potentially open to challenge. If such challenges occur, and particularly if they are successful, parties may become even more cautious than they are now.
- Given that most progress on increasing women's representation has resulted from positive action by the parties, future progress is therefore likely to be slow. Without positive action it will be difficult to increase women's representation, especially at Westminster where the single member constituency system creates particular obstacles. The policy of 50/50 shortlists adopted by Labour and the Liberal Democrats, for example, appears ineffective, whereas the all women shortlists system is effectively now illegal.

⁷² Although see the point made by Wadham and Mountfield in the previous section.

- The application of employment provisions in the Sex Discrimination Act (and Race Relations Act) to political party selection raises bigger questions for parties. There has already been one successful judgement against a party for race discrimination in the selection process.⁷³ If parties do not take positive action to improve women's (and possibly ethnic minority) representation, it seems likely that a growing number of cases will be brought by disgruntled members on the basis that the standard selection process is biased in favour of white men. Parties will not wish to see industrial tribunals called in to examine more and more of their selection contests. More importantly it is questionable whether this is a good thing for party democracy, since the requirement for equal opportunities selection appears to be in direct conflict with the desire to involve the maximum number of members in the process. There are growing pressures for 'one member one vote' selections from within parties. However, in such selections candidates are subject to the prejudices of each individual member who votes. If this leads to the selection of white males the parties have a serious problem, and in the face of future discrimination claims their only refuge may be more centralised and controlled selection processes involving small numbers of trained selectors. The question of the extent to which employment law should apply to the selection process is thus a difficult one, and how this is resolved is one of the key differences between options 2, 3 and 4, below.

Option 2: Amend the Sex Discrimination Act to exempt political selections

Prior to the *Jepson* decision, political parties (or at least the Labour Party) were operating under the belief that selection of candidates for political office was exempt from the Sex Discrimination Act. The Labour Party's lawyer argued at the tribunal that the selection of candidates was not covered by the employment provisions of the Act, but related to the 'constitution, organisation or administration' of the party, as covered by the exemption in Section 33.

One possible course of action would therefore be to amend the Act to clarify that candidate selection is not covered by the employment provisions in Part II. The Act already includes many specific exceptions to Part II, such as those for prison officers, midwives and ministers of religion. One option would be to include candidate selection as another such exemption. There are also a number of 'general exceptions' listed in Part V of the Act. Adding one of these to cover candidate selection would effectively extend the current exception provided in Section 33 to cover all provisions of the Act.

Advantages of this approach

- At least in some ways, this is a straightforward solution to the problem. An exemption to the Sex Discrimination Act would be a clear statement from government, giving the parties confidence to adopt positive action measures. It would restore the situation to that which many people believed held prior to 1996. Clarification of the situation in this way would be likely to encourage some parties, at least, to apply positive action measures and would thus be likely to result in an improvement in women's representation.
- Furthermore, there would be no restriction in UK discrimination law on what measures political parties could employ. Thus if a party wanted to adopt all women shortlists in half of its seats - or even all of its seats - it could not be subject to challenge under this part of the law. If some parties used this opportunity to adopt quite radical positive action policies, improvements in women's representation would be likely to be more rapid.

⁷³ See Section 3.1., footnote 35.

- Because political parties would be exempted from the employment provisions of the Sex Discrimination Act this would avoid completely the problem of tribunals investigating internal party selections. Party autonomy and democracy would therefore be protected, at least under the Sex Discrimination Act. If the law stated that candidature was not covered by Section 13 of this Act it might follow that parties should be exempted from Section 12 of the Race Relations Act, which is worded identically. In this case parties would no longer be troubled by discrimination claims from any disgruntled candidates.

Disadvantages of this approach

- The flip-side of the greater freedom which parties would enjoy would be that there was no guaranteed protection against discrimination in the selection process. The discriminatory action open to parties would not be restricted to positive action to promote under-represented groups. In some parties it could be these very groups which suffered. One positive result of the *Jepson* case was that all parties began examine their selection procedures to see if they might fall victim to a successful challenge of discrimination by a woman. This has resulted in a growth of equal opportunities approaches. However, this trend could be reversed if parties were exempted from discrimination legislation. As well as allowing all women shortlists in some parties this action might result in a return to all male shortlists in others, or even some parties openly requiring that all their candidates were male. If this were read across to the arena of race discrimination it could allow a party to bar ethnic minority candidates from standing for election.
- This situation could result in challenges to selection procedures using EU law or the Human Rights Act. A disgruntled candidate taking a case might cite the Equal Treatment Directive to claim that they had been subject to discrimination. However, as discussed above this appears unlikely to succeed. More likely is that, if discriminatory practices crept into party selection procedures, a case could successfully be brought under the Human Rights Act. If such discriminatory procedures were not focused on a 'legitimate aim' or were not 'proportionate' a case against a party might be upheld. As a result government might find it necessary to introduce legislation regulating the selection process at a later date.

Option 3: Amend the Sex Discrimination Act to allow positive action by parties

The two major disadvantages of option 2 suggest that a more attractive approach might be to allow positive action only, whilst retaining the general ban on discriminatory selection processes by the parties. This could ensure that women (and possibly other under-represented groups) could be beneficiaries of some discrimination in the selection process, but could not be its victims.

This objective could again be achieved through insertion of a new clause in the Sex Discrimination Act. This is essentially the course pursued by Julie Morgan MP in her proposed amendment to the Government of Wales Bill and Joan Ruddock MP in her proposed ten-minute rule bill (see Section 3.1). Like the clause which might be included in pursuit of option 2, this could be included either as a general exception to the Act, or as a 'special case' under Part II. Julie Morgan's proposal attempted the former of these and Joan Ruddock's the latter.

The objective of an amendment of this kind would be to allow all reasonable attempts at positive action, whilst not falling foul of EU or human rights law. (There is some potential conflict between these two aims, as discussed below.) If the government wanted to protect itself as far as possible from legal challenge, it might be best to phrase the new clause using

words from one or more of the sources of discrimination law with which the UK is required to comply.

One option would be to use EU legislation. Taking words from the Amsterdam Treaty would allow parties to 'ensure full equality in practice between men and women [by] adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a [candidacy] or to prevent or compensate for disadvantages'. These words, however, have been criticised for their lack of clarity.

Given that a successful challenge under the EU law appears, in any case, relatively unlikely, it might be more appropriate to adopt the somewhat clearer words from human rights legislation. Thus the new clause might refer to the 'legitimate aim' of increasing women's representation in elected democratic bodies, and allow parties to take action which was 'proportionate' in achieving this aim. This would be in keeping with the Human Rights Act. Such words could be supplemented with the phrase from the UN Convention on the Elimination of all forms of Discrimination Against Women which allows 'temporary special measures aimed at accelerating *de facto* equality between men and women'. This would bring UK law into line with that in several other EU member states.

A final option would be to use words from existing exceptions to the Sex Discrimination Act, for example Section 47 which allows a training body to afford:

women only, or men only, access to facilities for training, or encouraging women only, or men only, to take advantage of opportunities for doing that work . . . where it appears to the training body that at any time within the 12 months immediately preceding the doing of the act there were no persons of the sex in question doing that work in Great Britain, or the number of persons of that sex doing the work in Great Britain was comparatively small.

Similar exceptions apply under Sections 48 and 49 with regard to trade unions and professional bodies. Use of these words would result in a new clause which was in keeping with the existing provisions of the Act. However, this might offer less protection than using words from established human rights legislation. It would also restrict the use of positive action to settings where the number of women in office was 'comparatively small', rather than using the more ambitious aim of '*de facto* equality'.

Advantages of this approach

- An amendment to the Sex Discrimination Act to explicitly allow positive action would obviously provide a boost to parties wanting to take this action. If more parties adopted positive action this should result in an improvement in women's representation over time. Parties would however probably remain somewhat cautious about the particular measures which they adopted.
- Compared to option 2, this approach would allow positive action whilst preventing other, less benign, forms of discrimination. A party could not have a policy of all male shortlists, for example, unless they could successfully argue that men were an under-represented group. Aside from the exception for positive action, selection by parties would continue to be governed by Part II of the Sex Discrimination Act, which would encourage equal opportunities procedures.
- If the amendment used words chosen from EU law or the European Convention on Human Rights (Human Rights Act), there would be little risk to the government that the new law would be subject to successful challenge. Even if a case were taken to the

European Court of Justice and it was found that candidate selection was governed by the Equal Treatment Directive, a clause allowing limited positive action would probably be found to be compatible with the Directive.

Disadvantages of this approach

- If the new clause used quite general terms to state that positive action was now allowed, this would leave legal uncertainties. It would be left to parties and their legal advisers to decide, for example, what form/s of positive action were 'proportionate'. This matter would be disputed by lawyers, with some almost certainly claiming that a party operating a policy of all women shortlists in half the seats for Westminster was acting within the law, and others arguing the opposite. The position would not be settled absolutely until a case was taken against a party to interpret the terms of the new law in the UK courts. This might result in an over-cautious approach by the parties. The more specific the wording of the amendment in terms of what it allowed, the less the risk to the parties. For example saying that parties could take appropriate measures to ensure that half of their candidates were women would remove some of the pressure. This could leave the legislation itself more open to question - however, the risks of this still seem relatively low.
- Another problem with this approach is that, as under the present law, there could be difficulties for parties as a result of candidate selection remaining subject to employment discrimination law. This comes with the potential problems for party democracy described under option 1.

Option 4: A new electoral law permitting positive action

One of the major difficulties with option 3 is that it leaves parties subject to challenge in employment tribunals over their candidate selection procedures. Many believe that this is not the appropriate forum in which to resolve claims of discrimination, given the fundamental difference between candidate selection procedures in parties and those in ordinary job selection. Despite some of the positive effects of parties adopting more equal opportunities procedures for selection of candidates, there have been concerns voiced by some that this is reducing the diversity of candidates selected. The introduction of person specifications and the marking of candidates against pre-defined criteria may favour educated, middle class candidates and exclude more unconventional or maverick characters who have made up an important part of British political life in the past. Perhaps more importantly there is a potentially irreparable clash between the requirements of equal opportunities procedures and membership involvement in the process, as described under the disadvantages to option 1, above. The only way of avoiding these difficulties may be to ensure that under-represented groups are boosted through positive action.

Meanwhile option 2, which removed candidate selection from the scope of the Sex Discrimination Act, had problems of its own. This could result in unfair discrimination *against* women in the selection process within parties. A more attractive option would therefore appear to be removing candidate selection from employment discrimination legislation, but imposing other restrictions on the process that prevent unnecessary discrimination.

This approach would suggest the drafting of a short electoral law governing the selection process in political parties, and explicitly exempting candidate selection from the Sex Discrimination Act (and probably Race Relations Act). The bill to enact this might have two short clauses. The first would require that selection of candidates was fair and did not include unnecessary bias in favour of any particular group of candidates. The second would allow limited positive action by parties in this process, as outlined above.

Advantages of this approach

- This approach would have all the advantages of option 3 - it would allow parties to operate (perhaps limited) positive action policies within the law, whilst government was comparatively safe from the risk of legal challenge. In addition it would avoid the difficulties in option 3 of parties being subject to employment law when selecting their candidates.
- This approach would make explicit that candidate selection is a constitutional and not an employment matter, and bring UK law into line with that in many other EU member states. It would also bring us into line with those countries, such as Germany and Finland, which regulate the candidate selection process using electoral law.⁷⁴
- Under this system disputes between members and their parties, in the event of a claim of discrimination, would not be resolved through employment tribunals but through the ordinary courts, on the basis of compliance with the new electoral law.

Disadvantages of this approach

- This kind of legal change would retain the first disadvantage of option 3, that it might result in parties being over-cautious unless it was clear what forms of positive action were allowed.
- For some it might be seen as undesirable that electoral law begins to stray into candidate selection procedures, thus placing new regulations on parties. However, in practice these restrictions apply now, through employment law rather than electoral law. In the future there might be attempts to go further in regulating candidate selection, for example requiring some minimal level of democracy in the process. Again, some might see this as a disadvantage, although others would welcome such moves.

Option 5: Require positive action by law

All the previous options have aimed to create a permissive environment for parties to pursue their selection procedures. The legal changes proposed would give parties freedom to adopt positive action measures, but would not force them to do so. If a party continually failed to select women, the only legal remedy available would be for individual women in the party to claim that its selection procedures were discriminatory.

A final option would be to pursue the route which has been taken in Belgium and recently in France, and require parties to take a particular course of action.⁷⁵ There would be different ways of doing this. One would be to impose an equality of outcomes from the selection process, as now applies in France. This might require that all electoral lists proposed by parties (e.g. for the European elections and additional members in the devolved assemblies) were 'zipped'. However for single member constituency elections - which still predominate in the UK - the solution would be more difficult. Since parties are not state funded the

⁷⁴ These systems go much further than is suggested here. The German system is described in Section 2.1 above. In Finland the Electoral Act 1975 governs candidate selection, for example stating that all members must have a vote and that candidates with a certain number of nominations must be included on the ballot paper (V. Helander (1997) 'Finland', in P. Norris (ed.) *Passages to Power: Legislative Recruitment in Advanced Democracies*. Cambridge: Cambridge University Press).

⁷⁵ This approach has also been taken in other countries outside the EU. For example an electoral law in Argentina requires that 30% of candidates are women, whilst in India a recent constitutional amendment resulted in one third of local government seats being reserved for women (IPU (1997). *Democracy Still in the Making: A World Comparative Study*. Geneva: Inter-Parliamentary Union).

incentive used in France of threats to cuts to parties' funding would not be available. Thus a more draconian system might have to be used, for example reserving a particular proportion of seats in the legislature for women. A more moderate alternative would be to regulate the selection *process* for some elections, rather than its outcome. Thus a law could provide that party members must be presented with a balanced shortlist of candidates whenever selections take place. This would effectively be an extension of the 'fair selection' requirement included under option 4.

Action such as this would fall well outside the scope of the existing Sex Discrimination Act so would, like option 4, be best pursued through a new free-standing electoral law.

Advantages of this approach

- This is the only approach which would ensure rapid progress towards improving women's representation. All other approaches are dependent on the co-operation of the parties, which itself demands the parties' ability to convince their members of the benefits of positive action.
- Because the parties would be doing what they had to by law, there would be no risk of legal challenge to them directly. Because the law would be clear, there would be no arguments in court about what action by parties constituted 'proportionate' positive action or a 'fair' selection process.
- The problem of parties' selection procedures being subject to employment law would be overcome. However, the parties would be subject to greater restrictions than before over these procedures.

Disadvantages of this approach

- The restrictions on parties' freedom to select the candidates they want would be seen by many as a disadvantage. Introducing greater party regulation is itself a big step, and doing this in a way which compels parties to take action would be more radical still. Parties might not react well to a system which required them to select candidates of a particular sex, although they might be more prepared to accept a requirement for balanced shortlists.
- A bill to enact this approach would be less likely to pass than that to enact any of the other legal changes proposed above. Since the law would bind the parties, members of their parliamentary groups would consider it very carefully. Such a bill would almost certainly be opposed by the Conservatives, and probably by at least some representatives of the other parties, particularly in its most restrictive form.
- Additionally, although the parties would be free from the risk of legal challenge, this could be levelled at the government. Under EU law this would be a riskier strategy than any of the other options. The European Court of Justice would still be likely to rule that candidate selection was a constitutional matter outside the scope of the Equal Treatment Directive. However a greater risk might come under the Human Rights Act. A case could potentially be brought by a party member, or group of members, claiming that their right to select who they wanted had been unduly restricted. Again the situation might be different if balanced shortlists were required rather than certain seats being reserved for women and certain others for men. The former case seems likely to meet the requirement of 'proportionality'. However, in the latter case party members in one of these seats might claim that their right to participate had been restricted. This would appear more true than if the party had, through its own internal democratic process, decided to reserve a seat for

a woman. If all parties in a seat were required to run candidates of the same gender, members of the electorate could likewise claim that their right to 'free expression . . . in the choice of the legislature' had been restricted. One way of assessing the risks of such a strategy will be to watch events in France. No challenge to the new electoral law there may be forthcoming, but if such a challenge were taken under the European Convention on Human Rights or Equal Treatment Directive this would demonstrate the safety, or otherwise, of such a course for Britain.

Summary

Table 10: Options for the Future

Action	General consequences	Legal challenge against government	Legal challenge against parties
Option 1: Do nothing	<ul style="list-style-type: none"> Parties likely to remain cautious. Slow progress towards improving women's representation. To avoid discrimination claims, party selection processes may need to become more centralised. 	<ul style="list-style-type: none"> Unlikely. 	<ul style="list-style-type: none"> Would succeed if all women shortlists used. Might succeed against other positive action measures, if discrimination proved. Increasing challenges likely from women and ethnic minority members against standard selection process.
Option 2: Amend the Sex Discrimination Act to exempt political selections	<ul style="list-style-type: none"> Parties can pursue positive action. Women's representation likely to improve. Law can no longer be used to claim discrimination against parties. One member one vote (OMOV) selections protected. 	<ul style="list-style-type: none"> Possible under Equal Treatment Directive, but unlikely to succeed. 	<ul style="list-style-type: none"> No longer possible under Sex Discrimination Act, but may be forthcoming under Human Rights Act. 'Proportionate' positive action should be protected, but if parties found to discriminate <i>against</i> women this could be problematic.
Option 3: Amend the Sex Discrimination Act to allow positive action by parties	<ul style="list-style-type: none"> Parties can pursue limited positive action, with some caution remaining. Women's representation likely to improve. To avoid discrimination claims, party selection processes may need to become more centralised. 	<ul style="list-style-type: none"> Possible under Equal Treatment Directive, but unlikely to succeed. 	<ul style="list-style-type: none"> Action possible to establish which forms of positive action are allowable within the amended Act. Challenges by members who claim they have suffered discrimination in the standard selection process likely to continue.
Option 4: A new electoral law permitting positive action	<ul style="list-style-type: none"> Parties can pursue limited positive action, with some caution remaining. Women's representation likely to improve. OMOV selections protected. 	<ul style="list-style-type: none"> Possible under Equal Treatment Directive, but unlikely to succeed. 	<ul style="list-style-type: none"> Action possible to establish which forms of positive action are allowable within the new law. Any discrimination claims under electoral law, rather than employment law.
Option 5: Require positive action by law	<ul style="list-style-type: none"> Parties must pursue positive action. Women's representation certain to improve, and more quickly than with options 1-4. OMOV selections protected, within new constraints. 	<ul style="list-style-type: none"> Possible under Equal Treatment Directive. More risky but probably still unlikely to succeed. Also possible under Human Rights Act, with chance of success dependent on what form of action is prescribed. 	<ul style="list-style-type: none"> Little risk of challenge to positive action policies, unless these go beyond what is legally required. Reduced risk of challenge over (sex) discrimination, since fairer representation is prescribed.

Conclusion

Women remain relatively poorly represented in UK politics. Despite better representation in the new Scottish Parliament, Welsh Assembly and Greater London Assembly, the number of women in local government and at Westminster remains low. Where progress has been made, this has primarily been a result of parties adopting positive action policies to promote women as candidates.

Yet uncertainty about the state of the law has created barriers to this action within all parties. Now that it has been established that candidate selection is subject to the employment provisions of the Sex Discrimination Act, parties face a danger that more challenges to selection procedures will be brought. These may come from male members who feel they have been disadvantaged by positive action policies, as well as from female members (and ethnic minority members) who feel that the standard selection procedure disadvantages them. Parties may thus find themselves increasingly constrained in terms of the selection procedures they are able to pursue. If challenges of discrimination succeed, this may even bring into question parties' ability to run 'one member one vote' selections.

It therefore seems urgent that government should consider a change in the law which would allow parties to pursue positive action. This could also free them of the threat of answering to employment tribunals about their selection procedures. However, concerns about possible contravention of EU and human rights law have so far prevented government from taking this action.

The analysis in this report, resulting from discussion with senior lawyers and overseas experts, suggests that these fears are unfounded. Positive action is practised widely by political parties in Europe, and in some cases has been put on a statutory basis. International agreements of the EU, Council of Europe and UN have accepted positive action as a legitimate approach, and even proposed its adoption. The Treaty of Amsterdam amended the Treaty on European Union to include a clause supporting positive action. A recent ruling in the European Court of Justice has endorsed a positive action system which has many similarities to those used by UK political parties, and an amendment to the Equal Treatment Directive is proposed which would create an even more sympathetic environment. The European Convention on Human Rights recognises that positive action is justified if it is 'proportionate' and has 'legitimate' aims.

If UK law were changed to permit positive action by parties in selection of candidates this would be very unlikely to cause problems. The European Court of Justice would probably rule that EU law does not extend to candidate selection. Even if EU law was found to apply, the above factors mean the Court would be liable to find this compatible with a new UK law. A permissive law would also be extremely unlikely to be found in breach of human rights commitments.

The question therefore becomes how best government could change the law. The purpose of such a change would be to allow parties to employ legitimate positive action, whilst ensuring that candidate selection was fair and that parties were not subject to destabilising legal challenges. There are strong arguments for using a legal change to separate candidate selection from employment legislation altogether, and acknowledge - as other countries do - that this forms part of our constitutional arrangements. This would imply a new law governing candidate selection, rather than an amendment to the Sex Discrimination Act,

which is what has been proposed previously. Alternative forms that a new electoral law might take are set out above, in options 4 and 5.

Following a legal change, parties would potentially still be subject to challenge over whether the positive action measures they adopted were legitimate. From the perspective of the parties a clearly worded law, making explicit what forms of action were permitted, would offer most protection. However, unless a prescriptive law is passed some areas of legal uncertainty are liable to remain, and parties adopting radical positive action measures may need to defend these in court.